(1)

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

vs.

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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182pp

QUESTIONS PRESENTED

1. Under the Fourth Amendment, was petitioner's seizure complete when the petitioner submitted to the authority of the state's criminal summons by voluntarily going to court as directed in the summons or was something more required?

2. After his arraignment, was the petitioner continuously seized until the false felony charges were dismissed or was a new seizure effected each time the petitioner was given a court date to appear and the petitioner complied by returning to court on the designated dates or neither?

3. Under the Civil Rights Act of 1871, 42 U.S.C. § 1983, can a claim for malicious prosecution or unlawful seizure be brought for a violation of the 1st, 4th, or 14th Amendments when

    a. a police officer fabricates and files baseless criminal charges for the improper purposes of chilling and retaliating against petitioner's protected speech;

    b. the police officer seeks a summons instead of an arrest warrant (App. P, page 140a), so the petitioner was never taken into physical custody or booked by the police;

    c. a summons issues and the petitioner complies with the summons by reporting to court as ordered for arraignment;

    d. the judge releases the petitioner on his own recognizance after he is arraigned;

    e. a mandatory condition of any Massachusetts recognizance is that the petitioner "not depart without leave"; and

f. the petitioner returns to court twice more before the Court, sua sponte, dismisses the charges for want of prosecution when the prosecutor failed to supply Court Ordered Discovery and a Court Ordered Bill of Particulars?

4. Did the First Circuit Court of Appeals err when it ruled that the petitioner had waived his claims under the First Amendment and the Equal Protection Clause of the Fourteen Amendment?

5. Under the Seventh Amendment and Fed. R. Civ. P. 51, did the First Circuit Court of Appeals err when it ruled that the petitioner's damages on his State Law Malicious Prosecution Claim were inherently different from his damages on his 42 U.S.C. § 1983 Malicious Prosecution Claim, notwithstanding the jury instructions and the jury verdict to the contrary?

6. Did the First Circuit Court of Appeals err when it ruled that a Fourth Amendment violation had not occurred when a police officer seized and retained petitioner's lawfully possessed rifle in the absence of a warrant and in the absence of any facts establishing a recognized exception to the warrant requirement?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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Petitioner Randy Britton respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Britton v. Maloney*, 196 F.3d 24 (1st Cir. 1999) (App. A, page 1a). The opinion of the District Court is reported at *Britton v. Maloney*, 981 F. Supp. 25 (D. Mass. 1997)(App. B, page 23a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit ("Court of Appeals") was entered on November 8, 1999. The Court of Appeals denied a timely filed petition for rehearing and petition for rehearing en banc on December 23, 1999 (App. C and D, pages 91a and 94a, respectively). This petition is filed within 90 days of December 23, 1999 as permitted under Rule 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment: Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment: Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Seventh Amendment: Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fourteenth Amendment: Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 51. Instruction to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Mass. Gen. L. ch. 276, § 65 (1990)

The condition of a recognizance of a person, either with or without surety, binding him to appear before a court or justice to answer to a charge against him or to prosecute an appeal shall be so framed as to bind him personally to appear at the time so expressed, and at any subsequent time to which the case may be continued, unless previously surrendered or discharged, and so from time to time, until the final decree, sentence or order of the court or justice thereon, and to abide such final sentence, order or decree, and not depart without leave.

STATEMENT OF THE CASE AND DISTRICT COURT JURISDICTION

A. Underlying Facts of the Case

On June 30, 1990, Britton, the third African-American to graduate from both West Point and Harvard Business School, calmly but deliberately walked into the headquarters of the Boston Police Department holding the barrel and action portion of an AR-7 semiautomatic rifle (*See* Joint Trial Exhibit 17) in his right hand and his 5 year old daughter's hand in his left. Maloney's Appendix at 390:3-4; 559:14-15; 571:14-15; 576:14-25. Britton made sure that the muzzle of the rifle was pointed towards the floor at all times, and he kept the barrel of the unloaded rifle flush against his leg. Maloney's Appendix at 573:11-23; 578:1-3; 818:19-21. Britton immediately told Officer Springer, the unarmed black female police officer who was covering the front desk, that he was being chased by some people outside and that he needed safety and assistance. Maloney's Appendix at 577:4-10. Springer pushed an emergency button to summon help for Britton and his daughter. Maloney's Appendix at 818:22-23.

When help did not immediately arrive, Britton left his daughter with Springer in the lobby area of police head-

quarters and moved some 16 feet[1] away down the hallway towards the front door of police headquarters where he could observe traffic from the front door of police headquarters as the cars drove by. Maloney's Appendix at 577:14-20. No one came to Britton's aid in response to the emergency button Springer had pushed. Maloney's Appendix at 814:1-5; 815:2-3. The first officer on the scene was Det. Thomas Dooley, who just *happened* (Maloney's Appendix at 815:2-3) to be coming to work ten minutes early carrying coffee for his squad. Maloney's Appendix at 403:5-7. Dooley's partner, Det. Sgt. Patrick J. Maloney was not far behind. Maloney's Appendix at 403:9-10.

Dooley and Maloney had no knowledge that Britton and his daughter had come to the police station seeking safety and assistance because Dooley and Maloney were just coming to work and nothing in the record shows that a police radio broadcast had gone out over the police radio network reporting that there was a man with a gun in police headquarters.

Upon seeing Britton standing in the entryway of police headquarters looking out the door holding a rifle in his right hand (*See* Joint Trial Exhibit 19), Dooley put down his coffee (Maloney's Appendix at 440:7; 441:3-6; 444:18-19), and grabbed the barrel of the rifle. Maloney's Appendix at 440:2-10. Dooley labored under a mistaken belief that it was illegal to possess a rifle, except at home. Maloney's Appendix at 456:6 to 457:8. Dooley said nothing to Britton before grabbing the barrel of Britton's rifle. Maloney's Appendix at 441:10-11; 440:6-10. Dooley did not care why Britton had the rifle or what Britton was doing with the rifle; Dooley "was more concerned with alleviating the rifle from [Britton's] hand". Maloney's Appendix at 395:14-15.

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[1] This movement changed Britton's view from that shown in Joint Trial Exhibit 18 to that shown in Joint Trial Exhibit 23.

Because Dooley was in plain clothes and did not identify himself, Britton was reluctant to let go of the rifle. Maloney's Appendix at 578:7-8; 440:10. Dooley did not say freeze (Maloney's Appendix at 440:13-14), did not identify himself as a police officer, and did not pull his service revolver (Maloney's Appendix at 440:15-16). Maloney's Appendix at 578:12-14. Dooley yelled to Maloney "He's got a gun!" Maloney's Appendix at 499:8. Maloney approached Britton to help Dooley, but before he could reach Britton, Britton, with great presence of mind, responded "I've got an FID Card and it's unloaded." Maloney's Appendix at 499:9-10. Britton said this to Maloney and Dooley before he let go of the rifle. Maloney's Appendix at 499:11-12. There was not a major struggle for the rifle, Dooley had one hand on the barrel, and he was trying to pry Britton's fingers off the receiver with his other hand. (Maloney's Appendix at 461:24 to 462:2). Realizing that Maloney and Dooley were probably police officers, Britton submitted to their authority and let go of the rifle. Maloney's Appendix at 578:8-18. Britton immediately explained to the officers that he had come inside in order to flee from two people who had been chasing him.

At this time, the car with Britton's two pursuers inside drove by (Maloney's Appendix at 577:22), and Britton pointed them out (Maloney's Appendix at 578:21). Dooley took the rifle outside with him, and the car slowed and then stopped. Maloney's Appendix at 398:15-18; 578:23 to 579:2. One of the car's occupants, Tammy Loughlin, exited the vehicle and spoke with Dooley. Maloney's Appendix at 398:17-18. Eventually, Dooley also spoke with the driver of the car, Tyrone Stampley. Maloney's Appendix at 449:8-11. They had apparently chased Britton after mistaking him for someone else. Maloney's Appendix at 564:7 to 565:7.

Britton briefly observed the Dooley-Loughlin conversation from the front steps of police headquarters (Maloney's Appendix at 398:18-19; 579:1-2), then he went back inside the police station with Maloney and checked on his daugh-

ter. When Britton returned to the lobby area where his daughter and Springer were, he saw Springer get on the phone. Maloney's Appendix at 577:13; 814:1-6. The phone caller "was the [person] upstairs who was supposed to respond to [Springer's] emergency when [she] pushed the alarm button. This person wanted to know if [Springer] knew that [her] button was going off." Maloney's Appendix at 814:1-6. Springer was understandably upset that no one had responded to her emergency button in a timely, more serious manner, and she requested a break. Maloney's Appendix at 814:6-7.

While Dooley spoke with Loughlin and Stampley outside, Maloney stayed inside police headquarters with Britton. In fact, Maloney never spoke with Stampley or Loughlin on June 30, 1990 because, with the exception of the hallway incident, Maloney was upstairs with Britton at all times[2]. Maloney's Appendix at 450:13 to 451:5; 501:22-23; 502:11-12. Maloney concluded that Britton should "go upstairs [with him] and talk about it." He escorted Britton through a metal gateway (*See* Joint Trial Exhibit 24), up a flight of stairs, and into a squad room for further questioning. Britton adhered to his story throughout the brief interrogation that followed, which centered on the legality of the rifle. Maloney's Appendix at 579:10-16; 580:3-8. Britton also produced a Firearm Identification Card (an "FID card") to validate his possession of the rifle.

In any event, Maloney and Dooley verified the authenticity of Britton's FID card, determined that he did not have any outstanding warrants against him, and allowed him to leave the police station. At that point, neither Britton, Loughlin, nor Stampley was charged with a crime. None of them was told that they were the subject of a criminal investigation, except Maloney stated that the rifle Britton pos-

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[2] Because Maloney never spoke with Stampley and Loughlin, it follows that Stampley and Loughlin never told Maloney that Britton had assaulted them.

sessed might be an illegal firearm. Maloney's Appendix at 579:13-14. When Britton demanded to get his rifle back, Maloney refused, saying that he was going to turn the rifle in to ballistics so that ballistics could determine whether the rifle was a rifle or not. Maloney's Appendix at 380:16-24; 455:11-456:1; 579:13-25; 581:21 to 582:3. The rifle would be legal for Britton to possess with his FID Card if it was in fact a rifle, but it would be illegal for Britton to possess if it was not a rifle but was a firearm as defined by Mass. Gen. L. ch. 140, § 121 (1990)[3]. A firearm as defined by Mass. Gen. L. ch 140, § 121 (1990) requires a license to carry firearms which Britton did not have. Maloney's Appendix at 380:18-21; 579:14-16; 580:3-8; 581:1-6.

About an hour after arriving at police headquarters, on June 30, 1990, Britton left the station with a copy of Dooley's police report, which purported to document the incident and effectively served as a receipt for the seizure of the rifle. Still angry at the way that he had been treated, Britton telephoned Maloney that evening, demanded that the gun be returned, and threatened to sue in order to get it back. Maloney's Appendix at 594:11-17. Maloney refused to release the weapon reiterating what he had told Britton before Britton left police headquarters: Maloney told Britton that Britton was not going to get his rifle back until ballistics certified that his rifle was in fact a rifle[4]. Maloney's Appendix at 381:12-15. He repeated to Britton that he could go to ballistics in a few days and get his rifle back, if in fact it was a rifle as Britton had claimed. Maloney's Appendix at 381:10-15; 518:16-20.

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[3] Mass. Gen. L. ch. 140, § 121 (1990) states "A 'rifle' is a weapon having a rifled bore with a barrel length equal to or greater than sixteen inches, capable of discharging a shot or bullet for each pull of the trigger." The barrel on the AR-7 rifle is exactly 16 inches long. If the barrel was less than 16 inches, it would be defined as firearm.

[4] Ballistics certified the rifle as a rifle on July 16, 1990. Joint Trial Exhibit 6.

Three days later, on July 3, 1990, when the rifle had still not been turned in to ballistics (Maloney's Appendix at 595:25 to 595:11), Britton returned to the police station, to complain against Maloney to his supervisor, Deputy Superintendent James W. Wood. Maloney's Appendix at 596:21-24. While complaining to Wood, Maloney appeared and Britton confronted Maloney, in Wood's presence, and claimed that the seizure of his rifle had violated his Fourth Amendment rights. Maloney's Appendix at 597:6 to 598:16. Rather than giving the gun back, Maloney informed Britton that he faced criminal charges for allegedly using it to assault Loughlin and Stampley. Maloney's Appendix at 598:18 to 599:6. After the confrontation with Britton and Wood on July 3, 1990, Maloney filled out two applications for a criminal complaint against Britton, one for Loughlin and one for Stampley. Joint Trial Exhibit 4. [Reprinted at App. P, page 140a.]

Meanwhile, on July 5, 1990, Dooley turned the rifle in to the Boston Police Department's Ballistics Unit, along with a copy of the police report that Dooley had written and a Boston Police Department Form 2419 which listed the charges pertaining to the rifle as "ill poss firearm". Maloney's Appendix at 471:4-11; Joint Trial Exhibits 6, 11.

Subsequently, Britton received a summons in the mail to appear in Court on August 3, 1990. Maloney's Appendix at 599:18-19. The summons directed Britton to report to the probation officer where Britton had to give detailed financial information in order to qualify for a court appointed attorney[5]. The clerk called the list of criminal cases while Britton was still in the probation office. Because Britton was not "in Court" when the list was called, he was defaulted and an entry was made on the docket (Joint Trial Exhibit 3)

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[5] This fact may be inferred from the fact the Court appointed an attorney and the Court can take judicial notice that this is how it works.

[reprinted at App. O, page 139a] that reads "Fails to Appear on Summons Warrant to Issue." Britton subsequently appeared at his arraignment on August 3, 1990 (Maloney's Appendix at 599:22-23), and entered a plea of not guilty to the charges (Maloney's Appendix at 600:8-9). Britton was released on his own recognizance on a $500 Personal Recognizance Bond (Joint Trial Exhibit 3), under the mandatory conditions specified by Mass. Gen. L. ch. 276, § 65 (1990), inter alia, that he "not depart with out leave".

The docket is Joint Trial Exhibit 3, which is at page 1003 in the Maloney's Appendix [reprinted at App. O, page 139a], and it reads, in relevant part as follows:

7/5/90	Summons for 8/3/90 Issued
Aug 3 1990	Fails to Appear on Summons Warrant to Issue Pleads Not Guilty Attorney Appointed By Court $500 to Aug 30 Own Recog Bakas, J.
8/30/90	Motion received and filed 2 Allowed $500 as to each count to Sept 25 Own Recog O'Toole, J.
Sep 25 1990	Dismissed for Want of Prosecution Johnson, J.

Britton returned, as required, for two more court dates on August 30, 1990 and September 25, 1990.

Britton's court-appointed attorney moved for a Bill of Particulars. The prosecution failed to respond to the motion or to pursue the case in any meaningful way. As a result, on September 25, 1990, the Boston Municipal Court dismissed the case in its entirety for want of prosecution. Britton's ri-

fle was returned to him immediately thereafter. Maloney's Appendix at 599-601.

B. Proceedings in the District Court

Britton subsequently filed this lawsuit pro se against the City of Boston, the mayor, the police commissioner, and several of the police officers who had been involved at the station. The gravamen of Britton's Amended Complaint was that (1) the defendants fabricated criminal charges against him in order to penalize him for complaining about the confiscation of his rifle; (2) the defendants took the rifle away without sufficient justification for doing so; and (3) the Boston Police Department's policy on the handling of firearms is unconstitutional because it requires police officers to turn all guns that come into their possession in to the BPD Ballistics Unit[6] before returning the gun to its lawful owner, without regard to probable cause.

Even though the district court dismissed several of the defendants and many of the claims in the lawsuit on Motions For Summary Judgment and for Judgment as a Matter of Law, Britton's case against Dooley and Maloney went to the jury. Dooley prevailed on all of Britton's claims against him. Maloney, however, was found liable in the amount of $200,000 for having "violated [Britton's] federal civil rights by prosecuting him without probable cause and with an unconstitutional motive." App. M, page 131a. The jury also rendered a verdict against Maloney on a variety of parallel state law claims, but awarded no *additional* damages beyond the $200,000 in accordance with the District Court's Jury Instructions. App. L, page 130a.

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[6] BPD Rule 311 not only requires police officers to turn the guns in to Ballistics, but it also requires the Ballistics Unit to fire the gun, and to enter the bullet into the FBI's National Crime Information Center computer to see if it has ever been involved in a crime, and the Ballistics Unit maintains a copy of the bullet, in case the gun ever becomes involved in a crime in the future.

C. District Court Jurisdiction

The District Court's Jurisdiction was based on the presence of a Federal Question as provided by 28 U.S.C. § 1331.

D. Proceedings in the First Circuit

Maloney appealed (Docket No. 98-2095) and I cross-appealed (Docket No. 98-2096) to the First Circuit Court of Appeals. On appeal, the District Court's Judgment was affirmed in part, reversed in part, and remanded for further proceedings. (App. A, page 2a).

The background section of the First Circuit's Opinion at App. A, pages 2a to 5a, fails to state the facts in the light most favorable to me, so I have restated the facts, in the light most favorable to me, at pages 4 to 11 above, complete with page and line number citations to the Jury Trial Transcript.[7]

Sua Sponte, the First Circuit's Opinion (App A, page 1a) opened up a new issue: whether the damages on my Federal Malicious Prosecution Claim are inherently different from my damages on my State Malicious Prosecution Claim. *See* App. A, pages 14a, 16a. The Court opened up this issue even though Maloney, himself, would be precluded from doing so under the doctrine of invited error because Maloney asked for the jury instruction that is at the heart of the controversy. App. N, page 138a.

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[7] I recited this same version of the facts verbatim in my First Petition for Rehearing and Petition for Rehearing En Banc, dated November 18, 1999, even though this lengthy factual recitation caused the petitions to become oversized. The First Circuit accepted these oversized petitions for filing (App. E, page 96a), but it denied both petitions on the merits (App. C and D, pages 91a and 94a, respectively).

The First Circuit's Order denying my Petition for Rehearing (App. C, page 91a) created yet another issue: whether I waived my 42 U.S.C. § 1983 claims under the First Amendment and the Equal Protection clause (App. C, page 92a), despite my explicit reliance on these provisions to support my 42 U.S.C. § 1983 claim in my amended complaint, my post-trial submissions (*see* App. H, pages 103a-109a), and in the my opposing brief filed in the First Circuit (*see* App. J, pages 114a-118a). Even the jury instructions explicitly embraced the idea that false charges were fabricated to retaliate (Equal Protection Clause) against me *and* to chill my protected speech (First Amendment). App. L, pages 125a-125a. In the context of the jury instructions, the jury found that Maloney had violated my *several* constitutional rights. App. M, page 131a.

In its December 23, 1999 Opinion (App. A, page 1a), the First Circuit said:

> [a]lthough the proceedings below made passing references to the First Amendment or the Equal Protection Clause, the district court resolved the case in terms of the Fourth Amendment. Britton accepted this approach and adopted it in his post-trial submissions as well as his briefs and arguments before us. Under these circumstances, he has waived the claim. (App. A, page 92a).
>
> The existence of a bond was not argued below. (App. A, page 92a).
>
> The issue briefly arose when Maloney's Attorney spoke in the arguments before us, and when given the opportunity to present his side of the case, Britton never said that he had been required to post a bond. He has waived any significance the bond might have had because "a party cannot be permitted to raise a new issue for the First time on a peti-

> tion for rehearing in the court of appeals." (App. A, page 92a).
>
> Contrary to what Britton implies in his petition, [Trial Exhibit 3] does not use the word "bond' at all. Although a handwritten line in [Trial Exhibit 3] might be read as "500 to Aug 30 o—- r--," it is impossible[8] to tell whether this notation refers to a $500 bond, as Britton contends." (App. A, page 93a).

Contrary to the First Circuit's Opinion, both my post-trial submissions (Excerpts at App. H, pages 103a-109a) and my appellate briefs (Excerpts at App. J, pages 114a-118a) explicitly allege that Maloney's actions violated my rights under the First Amendment and the Equal Protection Clause, *in addition* to my rights under the Fourth Amendment. My March 17, 1997 post trial submissions (App. H, pages 102a) preceded Judge Gertner's September 1997 Opinion by six months, so it is impossible for me to have adopted Judge Gertner's *alleged* Fourth Amendment *only* approach in my post trial submissions.

Judge Gertner thought it would be redundant and unnecessary to explicitly find a violation under the First Amendment or the Equal Protection Clause *solely* because she had already found a violation under the Fourth Amendment, *Britton v. Maloney*, 981 F. Supp. 25, 40 n. 29 (D. Mass. 1997); App. B, page 50a, and not because she did not believe such a claim to be viable under those constitutional provisions. In fact, she implies that such a claim probably would lie un-

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[8] The notation was written by Marie Rose Ciulla, Session Clerk, in the Boston Municipal Court (BMC) back in 1990. Ciulla stills works in the BMC as a Session Clerk, and she has confirmed as late as January 12, 2000 (date of second round of petitions) that the notation says what I claim. See App. P, page 140a.

der these provisions, and she cites authorities to that effect. *See* footnotes 28 and 29, App B, pages 49a-50a.

In my post trial submissions, I argued every conceivable constitutional provision that might apply, including the First, Fourth, Fifth, and Fourteenth Amendments. Armed with Judge Gertner's well-researched opinion, I chose to defend the Judgment based on the First Amendment, the Fourth Amendment, and the Equal Protection Clause on appeal. *United States v. Doe*, 878 F. 2d 1546, 1554 (1st Cir. 1989) *citing RaxCorp. v. Anania Associates, Inc.*, 668 F.2d 622, 624 (1st Cir. 1982)("an appellee is obliged to present on appeal "viable justifications of a judgment.") I waived the Fifth Amendment. I did not waive the First Amendment or the Equal Protection Clause on appeal. *See* App. J, pages 115a and 118a where I begin and end the section of my brief opposing Maloney's Federal 42 U.S.C. § 1983 appellate arguments with the argument that all three constitutional amendments have been violated: First, Fourth, and the Equal Protection Clause.

At oral argument, I specifically informed the Court that I was relying on my briefs for any points not argued orally, without any objection from the Panel, so no waiver can be inferred from my failure to argue points orally that I had explicitly briefed. At page 17 of my opposing brief dated February 16, 1999, I wrote, "I was released on a $500 per count personal recognizance bond (Maloney's Appendix at 1003)." This assertion was repeated nine pages later when I wrote, "I also had to post a $500 bond as to each count for my release pending trial. *See* Trial Ex. 3 in Maloney's Appendix at page 1003." Joint Trial Exhibit 3 is App. O, page 139a.

At pages 26-28 of Maloney's brief filed in 98-2095, dated January 11, 1999, in a section entitled "Relevance of the Right Not to Suffer Retaliation," Maloney argues against my

Retaliation Claim under the First Amendment. App. I, page 110a. In reply to my opposing brief, Maloney's counsel even spent two and half pages responding to my First Amendment Retaliation Claim in her reply brief dated February 26, 1999 under a section heading entitled "No violation of the First Amendment". App. K, page 119a.

The First Amendment and the Equal Protection Clause basis for sustaining my 42 U.S.C. § 1983 claim was a live issue before the First Circuit that was, inexplicably, ignored in the First Circuit's Opinion.

Because I did not waive my First Amendment or Equal Protection Clause Claims, I sought leave to file a Second Petition for Rehearing and a Second Petition for Rehearing En Banc to correct this obvious oversight and injustice under the authority of *Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir. 1942)(Court of Appeals has the power to recall its mandate and to hear a second petition for rehearing on the merits to avoid an injustice), *cert. granted* 63 S.Ct. 265, 317 U.S. 621, *cert. granted* 63 S.Ct. 524, 317 U.S. 623, *reversed on other grounds* 63 S.Ct. 1098, 319 U.S. 315, *rehearing denied* 63 S.Ct. 1442, 320 U.S. 214.

I attached to my second round of petitions, documents, including excerpts from my opposing brief (App. J, page 113a) and my opposition to Maloney's post-trial motions (App. H, page 102a), that proved I have consistently pursued a multiple Constitutional Amendment based 42 U.S.C. § 1983 claim both in the District Court and the Court of Appeals.

I never adopted a Fourth Amendment <u>only</u> approach to my 42 U.S.C. § 1983 claim in either my post trial submissions in the District Court nor in my briefs before the First Circuit Court of Appeals, despite the First Circuit's erroneous Opinion to the contrary, App. A, page 92a.

Although the Full Court granted leave to file my Second Petition for Rehearing and my Second Petition for Rehearing En Banc (App F, page 98a), the Full Court denied them both, on the merits (App. G, page 100a).

This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This case provides an excellent vehicle to resolve the lingering questions that exist in the wake of *Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994).* Unlike the *Albright* case, where Albright's claims were very narrow, my claims are broad. Whether and under what conditions a 42 U.S.C. § 1983 claim exists for malicious prosecution is a question of national importance that this Court has not, but should answer. *Albrigh v. Oliver*, 510 U.S. 266, 275, 114 S. Ct. 807, 813 (1994) ("We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari.")

There is also disagreement between the Circuits as to whether a Malicious Prosecution Claim *must* be brought and analyzed under the Fourth Amendment *only* or whether some other provision, such as the First Amendment or the Equal Protection Clause can play a roll. *See E.g., Torres v. McLaughlin*, 163 F.3d 169, 172 (3rd Cir. 1998) (Third Circuit rejects notion that only the Fourth Amendment applies, but acknowledges that the Fourth and the Eleventh Circuits take the opposite view).

This raises the issue of what are the elements of the claim? The Circuits disagree here as well. "There is an embarrassing diversity of judicial opinion." *Albright v. Oliver*, 510 U.S. 266, 271 n. 4, 114 S. CT. 807, 811 n. 4 (1994). "The expansive approach is exemplified by the Third Circuit" *Id.* At where my success on my State Malicious Prosecution and Abuse of Process Claims would have meant automatic victory on my

Federal Malicious Prosecution claim. The First Circuit rejected that view. App. A, page 7a.

If seizure or deprivation of liberty governs Fourth Amendment based Malicious Prosecution Claims, the most common I suspect, then why should seizure be an element of a claim when retaliation or a desire to chill protected speech is at issue? The mere filing or just the threat of filing charges can have the desired chilling effect.

I. THE FIRST CIRCUIT UPHELD THE JURY VERDICT THAT MALONEY FILED BASELESS CRIMINAL CHARGES AGAINST ME IN RETALIATION FOR PROTECTED SPEECH, THEREFORE A § 1983 CLAIM EXISTS UNDER (1) THE FIRST AMENDMENT, (2) THE FOURTH AMENDMENT, AND (3) THE EQUAL PROTECTION CLAUSE.

I threatened to sue Maloney for the return of my rifle (Appendix at 522:5-8), and I followed up with a verbal complaint against Maloney to his supervisor, Dept. Supt. Wood, that Maloney's actions in seizing and retaining my rifle violated the Fourth Amendment (Appendix at 597:8 to 598:16). Maloney was present during the complaint to Dept. Supt. Wood, and Maloney retaliated by filing baseless criminal charges to suppress and chill my protected speech.

The First Circuit upheld the Jury's Verdict that Maloney retaliated against me to chill protected speech (App. A, page 13a), yet the First Circuit did not sustain the Federal 42 U.S.C. § 1983 verdict under the Fourth Amendment, the First Amendment, or the Equal Protection Clause. Under these facts, the First Circuit should have found a constitutional violation and upheld the 42 U.S.C. § 1983 claim under the First Amendment, regardless of whether the First Circuit found I was seized or not. *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 1594 (1998)("the general rule has long been clearly established . . . the First Amendment bars

retaliation for protected speech"); *Dombrowsi v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121 (1965)("[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *Ajao v. Nagle*, 116 F.3d 11, 15 (1st Cir. 1997)(even "an arrest based on probable cause might still be unlawful if the police officer acted simply for the purpose of punishing protected speech").

Judge Gertner cited a number of cases both from the First Circuit and the other Circuits showing that such a retaliation claim would lie under the First Amendment and the Equal Protection Clauses. *See* the cases collected at *Britton v. Maloney*, 981 F. Supp. 25, 38-40 (D. Mass. 1997), App. B, pages 45a-51a including *Hall v. Ochs*, 817 F.2d 920, 925 (1st Cir. 1987) and *Landrigan v. Warwick*, 628 F.2d 736, 742 (1st Cir. 1980); *also see Pontarelli v. Stone*, 930 F.2d 104, 113 (1st Cir. 1991). More recent cases from the other Circuits continue to hold that retaliation is actionable under the First Amendment. *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998); *Colson v. Grohman*, 174 F.3d 498, 513 n. 8 (5th Cir. 1999); *Cheminor Drugs, Ltd. v. Ethyl Corporation*, 168 F.3d 119, 128-29 (3rd Cir. 1999); *Poppel v. City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998).

While Judge Gertner analyzed my claims under the Fourth Amendment, she did note that other Courts have found malicious prosecution actionable under other Amendments. *Britton v. Maloney*, 981 F. Supp. 25, 38 n. 24 (D. Mass. 1997)("'It is theoretically possible . . . for a plaintiff to premise a Malicious Prosecution Claim on some other constitutional right.' *Singer v. Fulton County Sheriff*, 63 F.3d 110, 115 n. 5 (2nd Cir. 1995)"), App. B, page 46a. The 42 U.S.C. § 1983 claim on the verdict slip was worded so as to support any constitutional violation, not just a violation of the Fourth Amendment. App. M, page 131a.

Therefore, the First Circuit should have looked for alternate constitutional rights under which to affirm the 42 U.S.C. § 1983 claim and for alternative reasons to affirm the District Court's Opinion. *Hachikian v. FDIC*, 96 F.3d 502, 504 (1st Cir. 1996)(stating that the court of appeals is not wedded to the trial court's rationale, but may affirm its ruling on any ground made manifest by the record). At pages 22 to 35 of my opposing Brief filed in 98-2095 (some excerpts are at App. J, page 113a), I argued that the First Amendment, the Warrant Clause of the Fourth Amendment[9], and the Equal Protection Clause are alternative reasons for affirming the Federal 42 U.S.C. § 1983 claim.

II. THE $200,000 DAMAGE AWARD IS INDEPENDENTLY SUPPORTED BY ANY ONE OF THE FOUR LEGAL THEORIES UPON WHICH THE JURY FOUND MALONEY LIABLE, REGARDLESS OF WHETHER THAT THEORY IS BASED ON FEDERAL OR STATE LAW.

The jury found Maloney liable under (1) a Federal Civil Rights Claim under 42 U.S.C. § 1983, (2) a State Civil Rights Claim, (3) a State Malicious Prosecution Claim, and (4) a State Abuse of Process Claim. App. M, page 131a. My damages are the same regardless of the legal theory. As the jury was instructed (App. L, page 129a) Maloney is responsible for all of my damages that he "was a substantial factor in causing," not just those associated with my seizure or my attendance in Court. Judge Gertner addressed this issue in her September 26, 1997 Opinion. *Britton v. Maloney*, 981 F. Supp. 25, 56-57 (D. Mass. 1997), App. B., pages 89a-90a. Judge Gertner concludes that the damages are the same and that the $200,000 award is for <u>both</u> the federal and the state claims. That was the understanding of the parties, the jury,

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[9] Implied by *Matos v. Davillà*, 135 F. 3d. 182, 185 (1st Cir. 1998).

and the District Court. The First Circuit raised this issue sua sponte.

If the $200,000 award were not for the state law claims as well, then the Abuse of Process Claim would not lie because damages are a required element of an Abuse of Process Claim. Both the First Circuit and Judge Gertner have upheld the Abuse of Process Claim along with the other state law claims. Therefore, the $200,000 damage award must also cover the Abuse of Process Claim, and the Court should uphold the $200,000 damage award, even if the Court rejects the 42 U.S.C. § 1983 claim.

Because Maloney did not challenge the state law claim for abuse of process, in either of the lower courts, he has waived the right to challenge the Abuse of Process Claim. Accordingly, the elements of the Abuse of Process Claim are deemed admitted and the jury's verdict must stand. Because the only award of damages is for $200,000, that amount must be understood to apply to the Abuse of Process Claim, as well as the other state law claims, so there is no need for a re-trial on damages. I get the money based on the state law claim for abuse of process.

The Court should *not* read the word "*more*" out of the jury instruction. *See* the jury instruction in the First Circuit's Opinion, App. A., page 14a. The jury was instructed not to award *more* damages if they found a federal violation; they were not told to award *no* state damages if they found a federal claim, nor can it be inferred that that is what they did, else the Abuse of Process Claim would not lie. The zero next to the state law claims means *no additional* damages above the $200,000 already awarded; it does not mean *no* state damages; it means I get $200,000 for each and every claim, but I can only collect once. The difference is important; the jury instruction creates the functional equivalent of a verdict slip with only one line for a damages number. The

jury's verdict "must be construed in light of the totality of the circumstances, including the Court's instructions. *Putnam Resources v. Pateman*, 958 F.2d 448, 455 (1st Cir. 1992).

Because the damages are identical, and equally and independently supported by my state law claims, there is no risk of violating Maloney's Seventh Amendment rights under *Hetzel v. Prince William County*, 523 U.S. 208, 209-212, 118 S. Ct. 1210, 1211-12 (1998)(per curiam). Moreover, Maloney specifically asked for the jury instruction at issue (App. N, page 138a., which was incorporated into the verdict slip, and Maloney should not be able to benefit[10] from his requesting such a "trojan horse" jury instruction. *See* Maloney's Jury Instruction request in his Appendix at 197, App. N., page 138a.

III. I WAS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT WHEN MALONEY'S BASELESS CHARGES CAUSED ME TO BE SUMMONED TO COURT AND RELEASED ON A $500 PERSONAL RECOGNIZANCE BOND UNDER THE MANDATORY CONDITION THAT I "NOT DEPART WITHOUT LEAVE." MASS. GEN. L. CH. 276, § 65 (1990).

The First Circuit erred when it ruled that I was not seized because I was not arrested, having only received a summons. This ruling is squarely in conflict with this Court's ruling in *Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 812 (1994)* (plurality opinion)("his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment."). When I went to Court in response to the summons, I suffered a deprivation of liberty, and I was seized within the meaning of the Fourth Amendment.

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[10] If the maximum emotional distress damage award this Court will allow under *Koster* is $250,000, then I have little upside potential on a retrial when I am already at $200,000.

The First Circuit's assertion that a summons cannot effect a seizure conflicts with the Sixth Circuit's holdings in both *Bacon v. Patera*, 772 F.2d 259, 265 (1985) and *DePiero v. City of Macedonia*, 180 F.3d 770, 789 (1999). Moreover, the reasoning of the First Circuit Opinion is flawed. At App. A, pages 9a-10a, the First Circuit argues that

> *Terry* cannot be read to mean that the issuance of a summons (any more than a testimonial subpoena or a call to jury duty) would constitute a seizure simply because it threatens a citizen with the possibility of confinement if he fails to appear in court.

The First Circuit failed to recognize that a testimonial subpoena and a call to jury duty are civil processes that are a part of every citizen's civic obligation. A criminal summons, however, is another matter. The Fourth Amendment does not protect us against all seizures, just unreasonable ones. While a juror is admittedly seized for the duration of a trial, and a citizen called before a grand jury may wish to be elsewhere, these seizures are not unreasonable. *U.S. v. Dionisio*, 410 U.S. 1, 9, 93 S. Ct. 764, 769 (1973). All citizens have implicitly agreed to serve on jury duty, if called, or to testify when called so that others may be able to peacefully resolve their disputes. The framers recognized that there would be jurors, and they found it reasonable that every citizen should take a turn helping his fellow Americans resolve their disputes, without picking up dueling pistols At the same time, the framers decided that probable cause must be present before a citizen is indicted or otherwise made to answer criminal charges. While the states do not have to abide by the Fifth Amendment's indictment requirement, they do have to safeguard the probable cause requirement. *Albright v. Oliver*, 510 U. S. 266, 292, 114 S. Ct. 807, 822 (1994)(Stevens, Blackmun, JJ. Dissenting) *citing Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111 (1884).

The First Circuit's Opinion (App. A, page 9a) distinguished my case from *Evans*[11], *Gallo*, and *Murphy* on the theory that there were no restrictions on my liberty, other than the requirement that I go to Court on three occasions. But the First Circuit overlooked the fact that (1) I was released on my own recognizance on a $500 Personal Recognizance Bond[12] under the mandatory[13] condition that I "not depart without leave," and (2) a warrant was authorized for my arrest before I appeared in Court.

The Court must "evaluate the evidence in the light most favorable to [me], drawing every reasonable inference in [my] favor. App. A, pages 5a-6a *citing Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 27 (1st Cir. 1998). Therefore, it is fair to infer that I came to Court and surrendered in Court on the warrant (*see* page 10), and it is fair to say that I could not leave the Commonwealth of Massachusetts while charges were pending because a mandatory condition of any recognizance in Massachusetts is that the principal "not depart without leave". Mass. Gen. L. ch. 276, § 65 (1990).

Even if the Court cannot read the copy of Trial Exhibit 3 at App. O, page 139a, the Court knows that under Massachusetts Law, every Massachusetts criminal defendant is either (1) denied bail and held in physical custody pending trial, (2) released after posting bail, or (3) released after giving a personal recognizance. Mass. Gen. L. ch. 276, § 58 (1990). There are no exceptions permitted under Massachusetts Law: one of these three options *must be executed. Comm. v.*

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[11] *Evans v. Ball*, 168 F.3d 856 (5th Cir. 1999); *Gallo v. City of Philadelphia*, 161 F. 3d 217 (3rd Cir. 1998); *Murphy v. Lynn*, 118 F. 3d 938 (2nd Cir. 1997).

[12] This fact was pointed out at page 17 and pages 26-27 of my opposing Brief with a record citation to Joint Trial Exhibit 3.

[13] Mass. Gen. L. ch. 276, § 65 (1990). Reprinted at page 4.

King, 429 Mass. 169, 174, 706 N.E. 2d 685 (1999)(Judge or Magistrate "shall admit such person to bail on his personal recognizance without surety unless said justice [or] clerk . . . determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person before the court.").

The "not depart without leave" language means that I could not leave the Courtroom itself, *Fuller v. Meehan*, 118 Mass. 135 (1875), nor leave the jurisdiction of the Court (the Commonwealth), *Comm. v. Teevens*[14], 143 Mass. 210, 9 N.E. 524, 1887 Mass. LEXIS 263 (1887), without permission. Other states also use the "not depart without leave" language as part of their recognizance conditions, and the Courts in those states have uniformly held that it prohibits leaving the jurisdiction of the Court without leave, thereby abridging the constitutional right to interstate travel. *See E.g., Bankston v. State of Florida*, 270 So. 2d 326, 327 (Fla. Dist. Ct. App. 1973); *Aikins v. Superior Court of the State of Arizona*, 489 P. 2d 52, 54 (Ariz. Ct. App. 1971); *Gibson v. State*, 231 P. 2d 649, 653 (Okla. 1951)(Halley, J., dissenting).

> The *statute* clearly provides that the appeal bond shall be conditioned upon the fact that the defendant will not depart without leave of the court. So, we do not accept the significance defense counsel places on the fact that defendant unknowingly departed the State, to fulfill an outstanding penal sentence; and that he should therefore, be excused for his departure.

Williams v. State of Oklahoma, 457 P. 2d 796, 799 (Okla. Crim. App. 1969).

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[14] The LEXIS version of *Teevens* includes the facts of the case in the lower court which shows that Washburn admitted leaving the country without permission and that this was deemed a violation of the "not to depart without leave" language.

It is the *statute* under which the recognizance is given that matters, not whether those conditions appear in the record on appeal, because the Court can take judicial notice of Massachusetts Law. This Court reached the conclusion that the "not depart without leave" language of a Massachusetts Recognizance, coupled with the criminal penalties for a breach of the recognizance under Mass. Gen. L. ch. 276, § 82A constituted a deprivation of liberty that equaled "in custody" status within the meaning of the habeas corpus laws in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 301, 104 S. Ct. 1805, 1809 (1984). In *Murphy v. Lynn*, 118 F. 3d 938, 946 (2nd Cir. 1997) citing *Lydon*, the Second Circuit recognized the correlation between habeas corpus and Fourth Amendment seizures that I am making here, in the malicious prosecution context.

Indeed, there are more similarities between, Evans, Gallo, Murphy, and I than there are differences. Like all three, I had to come to Court whenever required and I could not depart the Court's jurisdiction without leave of Court. Like Evans, I had to give a Personal Recognizance Bond, and I had to give detailed financial information to the probation officer to qualify for a court appointed attorney. Like Evans, Gallo, and Murphy, I was seized for the purposes of bringing a Fourth Amendment Malicious Prosecution Claim.

This result is consistent with this Court's Fourth Amendment jurisprudence. *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 n. 7 (1994)("a violation of his constitutional right to interstate travel because of the condition imposed upon him pursuant to his release on bond"); *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 863 (1975)("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty.").

IV. IN THE ABSENCE OF INFORMATION RAISING A SAFETY ISSUE OR AT LEAST REASONABLE SUSPICION OF CRIMINAL ACTIVITY, THE POLICE MAY NOT TAKE A RIFLE FROM THE HAND OF ITS LAWFUL POSSESSOR.

Under the facts known to Dooley and Maloney, as recited from page 4 to page 11, supra, neither Dooley nor Maloney had information *at the time* they took my rifle to raise reasonable suspicion, let alone probable cause. Because the initial seizure was illegal, and no facts developed subsequent to the initial seizure to justify retention of the rifle, retention of the rifle was illegal as well. *United States v. Diallo*, 29 F. 3d 23, 25-26 (1st Cir. 1994)(lays out the proper analysis of probable cause). Facts learned after Dooley and Maloney seized my rifle and me cannot be used, in hindsight, to justify their actions. *Maryland v. Garrison*, 480 U.S. 79, 85, 107 S. Ct. 1013 (1987).

In the *Alvarado-Toole* line of cases, the Massachusetts Supreme Judicial Court squarely rejects the idea that a man with a gun, even a black man with a gun, without more, gives reasonable suspicion of criminal activity. *Commonwealth v. Alvarado*, 423 Mass. 266, 274, 667 N.E. 2d. 856, 862 (1996)("Our cases have not yet declared reasonable suspicion warranted simply on a report of gun possession just because this country has problems with the unlawful use of guns."); *Commonwealth v. Toole*, 389 Mass. 159, 163-164, 448 N.E. 2d 1264 (1983) ("carrying a .45 caliber revolver is not necessarily a crime" and thus there was no probable cause to search vehicle). There is no law against bringing a gun into a police station; it is not a school, courthouse, post office, nor any other area where the possession of a gun is prohibited by statute or ordinance, so there was no reasonable suspicion based on location either. In the absence of at least reasonable suspicion, the police have no right to stop, detain, or otherwise seize the gun owner or his gun. *Cf.*

United States v. Torres, 65 F.3d. 1241, 1247 (4th Cir. 1995)(cases cited).

There was no public safety concern. Neither Dooley nor Maloney had any information that I had threatened anyone when they seized the rifle, nor even when Maloney made the decision to retain the rifle. Appendix at 525:10-18; 496:9-21. Maloney retained the rifle because he was not trained to distinguish rifles from firearms as defined by Mass. Gen. L. ch. 140, § 121 (1990) and because Boston Police Department Rule 311 required him to retain it. Because my rifle was illegally retained by official BPD policy under BPD Rule 311, I have a claim against both Maloney and the City of Boston. *Towers v. City of Chicago*, 173 F.3d 619, 629 (7th Cir. 1999). Dooley admits that one factor in retaining the rifle was his belief that the rifle was illegally possessed (Appendix at 456:23 to 457:5), a belief Dooley maintained at least until July 5, 1990 when he filed his Form 2419 stating the evidence pertaining to the rifle was "ill poss firearm." Joint Trial Exhibit 11.

The cases the First Circuit cites to justify the seizure of my rifle, *Astrada v. Howard*, 979 F. Supp. 90, 96 (D. Conn. 1997) and *United States v. Donlin*, 982 F.2d 31, 34 (1st Cir. 1992), are inapposite because in each case, evidence of criminal activity was apparent before the seizures were made. Astrada had a smoking gun and had just fired at the windshield of an occupied truck when he frantically entered police headquarters and banged on the window. Within minutes, Astrada was followed into the police station by panting people who accused Astrada of shooting at them. Donlin possessed a sawed-off shotgun which is per se illegal, and he had pointed it at police officers before the seizure. In the case at bar, I had done nothing wrong, and no one was claiming that I had.

CONCLUSION

The petition for a writ of certiorari should be granted.

Even though I was seized, and I have a valid claim under the Fourth Amendment, the First Circuit should have looked for alternate constitutional rights under which to affirm the 42 U.S.C. § 1983 claim and for alternative reasons to affirm the District Court's Opinion. *Hachikian v. FDIC*, 96 F.3d 502, 504 (1st Cir. 1996)(stating that the Court of Appeals is not wedded to the trial court's rationale, but may affirm its ruling on any ground made manifest by the record). I have consistently argued that the First Amendment and the Equal Protection Clause are the alternatives, and these arguments are clear on the attached record excerpts (App. I-J, pages 110a, 113a, and 119a, respectively), which were (1) filed in opposition to Maloney's Post Trial Motion and (2) filed on appeal.

It would be a grave injustice to me for this Court not to grant this petition for a writ of certiorari to address the merits of my Retaliation Claim based on the First Amendment, the Fourth Amendment and the Equal Protection Clauses, and it will also add to the malicious prosecution confusion that plagues the Federal Courts.

Lastly, there was no waiver and the police cannot take lawfully possessed guns from former military officers in the absence of a warrant or other approved circumstances, not present in this case.

Respectfully submitted,

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Dated: March 22, 2000

APPENDIX

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED, DECIDED, AND FILED ON NOVEMBER 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

(Heard: September 10, 1999 Decided: November 8, 1999)

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Before
Boudin, Circuit Judge
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Entered: November 8, 1999

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STAHL, *Circuit Judge*:

Randy Britton filed this lawsuit in order to redress alleged violations of his civil rights that took place after he walked into a police station carrying a rifle in his hands. On motions for summary judgment and for judgment as a matter of law, the district court dismissed many of the defendants and several of the claims made in the case. Ultimately, a

jury rendered a verdict against one of the defendants, Patrick Maloney, in the amount of $200,000.00. This appeal followed, in which Maloney seeks to overturn the judgment against him while Britton hopes to revive some of his unsuccessful causes of action. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I.

Background

All of the questions before us require that we read the record in the light most favorable to Britton. See *Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 27 (1st Cir. 1998)* (reviewing the grant or denial of judgment as a matter of law by considering the evidence in the light most favorable to the nonmoving party); *St. Hilaire v. City of Laconia, 71 F.3d 20, 24 (1st Cir. 1995)* (reviewing the entry of summary judgment by taking the facts in the light most favorable to the nonmoving party).

On June 30, 1990, Britton walked into the headquarters of the Boston Police Department carrying an AR-7 semiautomatic rifle. The first police officer to see him thought that he was a gunman and pushed a panic button on her desk in order to get help. Detective Thomas Dooley confronted Britton, grabbed him, and wrested the rifle away. Although Sergeant Patrick Maloney joined in the fray as well, the situation resolved itself without injury. It turned out that the gun was unloaded and that its stock had been removed.

Britton immediately explained to the officers that he had come inside in order to flee from two people who had been chasing him. Sergeant Maloney concluded that Britton should "go upstairs [with him] and talk about it." He escorted Britton through a metal gateway, up a flight of stairs, and into a squad room for further questioning. Britton adhered to his story throughout the brief interrogation that

followed. He also produced a Firearm Identification Card (an "FID card") to validate his possession of the rifle.

After removing an ammunition clip and car keys from Britton's pocket, Detective Dooley left the building to find out more. He began by examining Britton's car and collected some of the items that he found inside, including the stock of the rifle, a box of ammunition, and the registration for the vehicle itself. At some point thereafter, Dooley also interviewed Britton's alleged pursuers, Tammy Loughlin and Tyrone Stampley. They had apparently chased Britton after mistaking him for someone else.

In any event, Maloney and Dooley verified the authenticity of Britton's FID card, determined that he did not have any outstanding warrants against him, and allowed him to leave the police station. At that point, neither Britton, Loughlin, nor Stampley was charged with a crime. None of them was told that they were the subject of a criminal investigation. But when Britton demanded to get his rifle back, Maloney refused, saying that he would have to confiscate it "for safekeeping."

Britton left the station with a copy of Dooley's police report, which purported to document the incident and effectively served as a receipt for the seizure of the rifle. Still angry at the way that he had been treated, Britton telephoned Maloney that evening, demanded that the gun be returned, and threatened to sue in order to get it back. Maloney refused to release the weapon but offered little explanation as to why he had decided to keep it.

Three days later, on July 3, 1990, Britton returned to the police station, where he confronted Maloney and claimed that the seizure of his rifle had violated his Fourth Amendment rights. Rather than giving the gun back, Maloney informed Britton that he faced criminal charges for using it to

assault Loughlin and Stampley. Subsequently, Britton received a summons in the mail, appeared at his arraignment on August 3, 1990, and entered a plea of not guilty to the charges.

Britton's court-appointed attorney moved for a bill of particulars. The prosecution failed to respond to the motion or to pursue the case in any meaningful way. As a result, on September 25, 1990, the Boston Municipal Court dismissed the case in its entirety for want of prosecution. Britton's rifle was returned to him immediately thereafter.

Britton subsequently filed this lawsuit pro se against the City of Boston, the mayor, the police commissioner, and several of the police officers who had been involved at the station. The gravamen of Britton's Amended Complaint was that (1) the defendants fabricated criminal charges against him in order to penalize him for complaining about the confiscation of his rifle; (2) the defendants took the rifle away without sufficient justification for doing so; and (3) the Boston Police Department's policy on the seizure of firearms is unconstitutional because it directs police officers to seize guns that they encounter without regard to probable cause.

Even though the district court dismissed several of the defendants and many of the claims in the lawsuit on motions for summary judgment and for judgment as a matter of law, Britton's case against Dooley and Maloney went to the jury. Dooley prevailed on all of Britton's claims against him. Maloney, however, was found liable in the amount of $200,000.00 for having "violated [Britton's] federal civil rights by prosecuting him without probable cause and with an unconstitutional motive."[1] The jury also rendered a ver-

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[1] Britton alleged that Maloney's pursuit of baseless criminal charges against him caused him (1) to suffer emotional distress; and (2) to lose his job as an investment banker. The district court allowed Britton to testify

dict against Maloney on a variety of parallel state law claims, but awarded $0.00 damages.

Although Britton's lawsuit against the city is still pending, the district court has certified his case against Maloney as a separate and final judgment from which an immediate appeal can be taken. See Fed. R. Civ. P. 54(b). Maloney disputes his liability altogether, while in his cross-appeal, Britton seeks to revive some of the claims that the trial court rejected.[2]

II.

We consider Maloney's assignments of error first. Maloney begins by arguing that the district court erred in denying his motion for judgment as a matter of law with respect to Britton's constitutional malicious prosecution claim. De novo review is required. See *Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 27 (1st Cir. 1998).* We evaluate the

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to his emotional distress but precluded him from offering evidence of his alleged economic loss because he failed to produce his tax returns during discovery. See *Britton v. Maloney, 981 F. Supp. 25, 34 n.17 (D. Mass. 1997).* As a result, the jury's award of damages only reflected the emotional distress that Britton sustained. Britton has not appealed the district court's decision to limit his recovery in this way.

[2] Rule 54(b) of the Federal Rules of Civil Procedure permits the entry of a separate, appealable judgment when there is "no just reason for delay." Fed. R. Civ. P. 54(b). The propriety of an immediate appeal under Rule 54(b) turns on a number of factors, including (1) whether the disputed ruling is final; (2) whether the disputed ruling raises legal or factual issues that overlap with any claims that remain pending in the district court; and (3) how the equities and efficiencies of piecemeal review would compare to those in a single proceeding. See *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 706 (1st Cir. 1996).* Because Britton's case against Maloney is now complete, because the issues that it raises are analytically distinct from those in Britton's case against the city, and because there is little risk of prejudice from immediate appellate review, we accept the district court's certification under Rule 54(b).

evidence in the light most favorable to Britton, drawing every reasonable inference in his favor. See *id.*

Britton's constitutional malicious prosecution claim turned on the theory that Maloney's pursuit of unfounded criminal charges against him violated his Fourth Amendment rights. Although a plurality of the Supreme Court has concluded that the Due Process Clause of the Fourteenth Amendment does not provide a substantive right to be free from criminal prosecutions unsupported by probable cause, the Court has "expressed no view" as to whether the burden of baseless criminal charges might effect an unlawful "seizure" and thereby trigger a Fourth Amendment claim. *Albright v. Oliver, 510 U.S. 266, 274-75, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994)* (plurality opinion).

Every circuit to have considered the question since Albright has expressed general agreement with the view that state actors who pursue malicious prosecutions against others may be held to have violated the Fourth Amendment, thereby risking the imposition of liability under *42 U.S.C. § 1983.*[3] We have yet to confront the issue directly, see *Meehan v. Town of Plymouth, 167 F.3d 85, 88 (1st Cir. 1999)* ("There is a possibility that Meehan's § 1983 malicious prosecution claim may be actionable under the Fourth Amendment."); *Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 n.5 (1st Cir. 1996)* ("We need not explore this virgin territory."), and need not do so here. We will simply assume, for the purposes of the analysis, that the type of conduct which

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[3] See *Evans v. Ball, 168 F.3d 856, 860-61 (5th Cir. 1999); Spurlock v. Satterfield, 167 F.3d 995, 1005-06 (6th Cir. 1999); Gallo v. City of Philadelphia, 161 F.3d 217, 221-22 (3d Cir. 1998); Uboh v. Reno, 141 F.3d 1000, 1003 (11th Cir. 1998); Brooks v. City of Winston-Salem, 85 F.3d 178, 183-84 (4th Cir. 1996); Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996); Singer v. Fulton County Sheriff, 63 F.3d 110, 114-16 (2d Cir. 1995); Smart v. Board of Trustees of the Univ. of Illinois, 34 F.3d 432, 434 (7th Cir. 1994).*

constitutes a malicious prosecution under state law can sometimes constitute a violation of the Fourth Amendment as well. Cf. *Carey v. Piphus, 435 U.S. 247, 258, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978)* ("In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right."). Even if we take this assumption to be true, we do not believe that Maloney's pursuit of baseless criminal charges violated Britton's Fourth Amendment rights in this case.

To acknowledge similarities between a malicious prosecution claim and a Fourth Amendment claim is not to say that the two causes of action are identical in every respect, or that proof of the former will always suffice as proof of the latter. After all, the Fourth Amendment does not speak of unreasonable "prosecutions," and instead refers only to unreasonable "searches and seizures." U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added)). For a state actor to violate the Fourth Amendment by initiating a malicious prosecution against someone, the criminal charges at issue must have imposed "some deprivation of liberty consistent with the concept of [a] 'seizure.'" *Singer, 63 F.3d at 116.* The crux of the inquiry is whether a "seizure" occurred, for as we have stated before, "the essential elements of actionable section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort." *Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995).*

Expressed differently, the constitutional violation lies in the "deprivation of liberty accompanying the prosecution"

rather than in the prosecution itself. *Gallo, 161 F.3d at 222.* In many cases, this is a distinction without a difference because the filing of criminal charges triggers the issuance of a warrant which leads to an arrest and thereby effects a "seizure" within the meaning of the Fourth Amendment. See *Taylor, 82 F.3d at 1561 n.5* ("In this particular case . . . the 'seizure' issue is fairly straightforward, because Mr. Taylor remained in detention, and therefore effectively 'seized,' throughout the time period in question."). But here, Britton was never arrested or detained on the underlying criminal charges that form the basis of his malicious prosecution claim. After Maloney filed the criminal complaint against him, Britton received a summons in the mail. No warrant was required to secure his appearance at the hearings in his case. Against this background, the narrow question before us is whether a state actor effects a "seizure" within the meaning of the Fourth Amendment by filing baseless criminal charges against someone, even when those charges never cause the respondent to be arrested or detained.

Having considered the question in some detail, the Second, Third, and Fifth Circuits have concluded that something less than forcible detention will suffice to constitute a seizure. See *Evans, 168 F.3d at 860-61* (holding that a seizure occurred because the plaintiff "was fingerprinted, photographed, forced to sign a personal recognizance bond, and required to report regularly to pretrial services, to obtain permission before leaving the state, and to provide federal officers with financial and identifying information"); *Gallo, 161 F.3d at 222* (holding that the conditions of pretrial release effected a seizure because the plaintiff was required "to post a $10,000 bond . . . to attend all court hearings . . . to contact Pretrial Services on a weekly basis, and . . . [to refrain] from traveling outside New Jersey and Pennsylvania"); *Murphy v. Lynn, 118 F.3d 938, 946 (2d Cir. 1997)* (concluding that the obligation to appear in court in connection with criminal charges, coupled with restrictions on in-

terstate travel, amounted to a seizure), cert. denied, *522 U.S. 1115, 118 S. Ct. 1051, 140 L. Ed. 2d 114 (1998).*

But unlike in Evans, Gallo, and Murphy, Britton's criminal prosecution in this case did not impose any restrictions on his liberty other than the legal obligation to appear in court at a future date. As we have stated, Britton merely received a summons in the mail. He was never arrested on the charges at issue. Nothing in the record indicates that he had to post a bond or to limit his travel before the ultimate hearing in which those charges were dismissed for want of prosecution. Although Britton contends that the summons alone constituted a seizure because it threatened him with arrest if he failed to appear, see *Albright, 510 U.S. at 279* (Ginsburg, J., concurring) ("Such a defendant is scarcely at liberty . . . so long as he is bound to appear in court and answer the state's charges."), there is no controlling authority on point. Several circuits have expressly declined to reach the issue. See *Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996); Nesmith v. Taylor, 715 F.2d 194, 196 (5th Cir. 1983)* (per curiam).

In our view, the Supreme Court's Fourth Amendment jurisprudence belies Britton's claim that he was seized. The use of force is certainly not required to effect à seizure. A mere "show of authority" can suffice. *Terry v. Ohio, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).* But Terry cannot be read to mean that the issuance of a summons (any more than a testimonial subpoena or a call to jury duty) would constitute a seizure simply because it threatens a citizen with the possibility of confinement if he fails to appear in court. As the Court's more recent decisions make clear, neither the use of physical force nor a show of authority amounts to a seizure unless it results in the "intentional acquisition of physical control" over the subject and causes a "termination of [his] freedom of movement." *Brower v. County of Inyo, 489 U.S. 593, 596-97, 103 L. Ed. 2d 628, 109 S.*

Ct. 1378 (1989) (emphasis added). In order for a seizure to occur, the subject must "yield" to the assertion of authority over him and thereby have his liberty restrained. See *California v. Hodari D., 499 U.S. 621, 626, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991).*

Absent any evidence that Britton was arrested, detained, restricted in his travel, or otherwise subject to a deprivation of his liberty before the charges against him were dismissed, the fact that he was given a date to appear in court is insufficient to establish a seizure within the meaning of the Fourth Amendment. Cf. *DePiero v. City of Macedonia, 180 F.3d 770, 789 (6th Cir. 1999)* (concluding that the issuance of a traffic citation did not effect a seizure until the plaintiff failed to appear in court and was served with a bench warrant), petition for cert. filed, - U.S.L.W. - (Sept. 21, 1999) (No. 99-522). As a result, we conclude that Maloney was entitled to judgment as a matter of law on Britton's constitutional malicious prosecution claim.

III.

Maloney contends that the district court also erred in refusing to grant judgment as a matter of law against Britton on his state law malicious prosecution claim. De novo review applies. See *Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 27 (1st Cir. 1998).*

In order to recover for malicious prosecution, Massachusetts requires a plaintiff to prove "that [the defendant] instituted criminal proceedings against [him] with malice and without probable cause and that those proceedings terminated in [his] favor." *Correllas v. Viveiros, 410 Mass. 314, 572 N.E.2d 7, 10 (Mass. 1991)* (citing *Beecy v. Pucciarelli, 387 Mass. 589, 441 N.E.2d 1035, 1038 (Mass. 1982)).* Successful termination of the underlying action is a "threshold requirement" of the claim. *Cole v. Pulley, 18 Mass. App. Ct. 950, 468 N.E.2d*

652, 653 (Mass. App. Ct. 1984). Maloney contends that Britton's malicious prosecution action was facially deficient in this regard because the criminal charges against him were dismissed for want of prosecution without any inquiry into the merits.

Massachusetts courts historically regarded malicious prosecution claims with disfavor because of their "tendency to deter men who know of breaches of the law, from prosecuting [the] offenders." *Cloon v. Gerry, 79 Mass. 201, 202 (1859).* Consistent with this view, Massachusetts law held plaintiffs strictly to each element of the cause of action. See *Stone v. Crocker, 41 Mass. 81, 83 (1833)* (warning that the "true principles" of a malicious prosecution claim must be "strictly adhered to"). In order to establish that the underlying proceedings terminated in his favor, a plaintiff who sought to recover for malicious prosecution had to show that he prevailed in an actual adjudication on the merits. See *Bacon v. Towne, 58 Mass. 217, 235 (1849)* ("It must appear, before this action will lie, that the defendant in the indictment has been fully acquitted . . . ."). A nolle prosequi was insufficient proof of successful termination, as was the dismissal of a complaint before trial. See *Bannon v. Auger, 262 Mass. 427, 160 N.E. 255, 258 (Mass. 1928)* ("'The effect of dismissing a complaint without a trial is like that of quashing or entering a nolle prosequi of an indictment. By neither of these is the defendant acquitted of the offence charged against him, but he is only exempted from liability on that complaint or indictment.'" (quoting *Commonwealth v. Bressant, 126 Mass. 246, 247 (1879))).*

But in Wynne v. Rosen, the Supreme Judicial Court abandoned its long-established rule and held that a prosecutor's decision to nolle prosequi a case or to move to dismiss would demonstrate successful termination of the underlying action as long as the circumstances "compelled an inference that there existed a lack of reasonable grounds to pur-

sue the prosecution." *391 Mass. 797, 464 N.E.2d 1348, 1351 (Mass. 1984).* In adopting the position taken by virtually every other jurisdiction to have addressed the issue, the court concluded that a criminal defendant should not have to risk a trial on the merits simply to preserve his ability to sue for malicious prosecution later. See *id. at 1352;* see also *Loeb v. Teitelbaum, 77 A.D.2d 92, 432 N.Y.S.2d 487, 494 (App. Div. 1980)* ("The societal interest [against malicious prosecution claims] cannot extend so far as to compel individuals charged with criminal offenses -- and who may desire civil retribution -- to resist dismissal of the charges against them in the face of the prosecutor's failure to prosecute and the court's desire to dismiss the complaints."), modified on other grounds, *439 N.Y.S.2d 300 (1981),* quoted in *Wynne, 464 N.E.2d at 1352.*

The circumstances surrounding Britton's case are admittedly somewhat unique because the criminal charges against him were dismissed by the court for want of prosecution. But as the Wynne decision at least suggests, the fact that a criminal prosecution is dismissed by a trial judge instead of nol prossed by a district attorney makes little difference, see *Wynne, 464 N.E.2d at 1350 n.2* ("We would reach the same result under either banner."), as long as the circumstances remain consistent with the innocence of the accused. Drawing every inference in Britton's favor (as we must in reviewing the denial of Maloney's motion for judgment as a matter of law), we agree with the district court that Britton terminated his criminal case with success and under circumstances that reflect his innocence.

The facts that support this conclusion are readily apparent. After producing an FID card for his rifle, Britton was able to leave the police station a free man. He was given a copy of a report that purported to include "all the important facts" and that said nothing about an alleged assault, even though Dooley and Maloney had already interviewed

Loughlin and Stampley by then.[4] Maloney spoke with Britton over the telephone that evening and never indicated that the rifle was part of a criminal investigation into Britton's conduct. It was only after Britton returned to the station and heatedly demanded the rifle again that Maloney informed him of the charges. Nevertheless, the prosecution could not provide a bill of particulars to support the criminal complaint. Stampley ultimately denied that Britton had assaulted him and denied ever making such a claim to the police.

When viewed as a whole, these facts permitted the jury to conclude that (1) Maloney filed the charges as a retaliatory response to Britton's bothersome insistence on getting his rifle back; (2) the prosecution declined to pursue the charges because they were baseless; and (3) the criminal complaint was dismissed accordingly. Against this background, we conclude, like the district court, that Britton's criminal prosecution terminated in his favor within the meaning of Massachusetts law. The district court properly denied Maloney's motion for judgment as a matter of law on Britton's state law malicious prosecution claim.

IV.

We now face a very unusual problem. The jury found in Britton's favor on both his federal constitutional claim (which we have rejected) and his state law malicious prosecution claim (which we have upheld). But the jury awarded

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[4] Maloney tried to contradict Dooley by claiming that they did not interview Loughlin and Stampley until later -- which would have explained why it took several days to bring charges against Britton. As the district court observed, the inconsistency between the officers' testimony provides inferential support for the conclusion that the charges against Britton were baseless and that the criminal case was dismissed because he was innocent.

Britton $200,000.00 for the former and $0.00 damages for the latter.[5] Because we have set aside the jury's determination of liability on the only claim for which it awarded damages, while upholding its determination of liability on a claim for which no damages were given, it might be argued that Britton is not entitled to any recovery for the wrongful initiation of criminal proceedings against him.

But it appears that at trial, neither party attempted to distinguish between the damages that Britton allegedly suffered because of the purported seizure challenged in his federal constitutional claim and the malicious prosecution complained of under state law. A further complication arose when the district judge included the following charge to the jury:

> By the way, the plaintiff is not entitled to double recovery. Therefore, if you award him damages for his suffering from, for the constitutional claim, the 1983 claim, you may not award more damages under the common law claim. In other words, all of these are allegations that pertain to the same damages. And you can't award double damages for each of these violations . . . .

Although there is no way to prove the point, it is highly likely that the jury failed to award damages on the state law malicious prosecution claim because it thought that any additional recovery would duplicate the damages that it had already awarded for the alleged violation of Britton's Fourth Amendment rights.

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[5] The jury also found in Britton's favor on state law claims for abuse of process and violations of his civil rights, with $0.00 damages for each. Neither claim is at issue in this appeal.

The problem of guarding against double recovery is a familiar one when multiple claims exist but separate damages on each would be partly or wholly duplicative. If the parties explicitly agree that the damages should be the same on each claim, then it is easy enough to construct special interrogatories that identify separate bases for liability but have only a single line for damages. See, e.g., *Stewart & Stevenson Servs., Inc. v. Pickard, 749 F.2d 635, 644-45 (11th Cir. 1984).* On the other hand, when the amounts awarded could conceivably differ depending on the claim but may also involve some overlap, verdict forms sometimes require a separate specification of damages for each claim on which the jury determines liability, leaving it to the judge to make the appropriate adjustments to avoid double recovery. See, e.g., *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 451 n.3, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993).*

Rather than pursuing either of these options in this case, the district court gave an instruction whose literal effect was to prevent the jury from awarding any state law damages at all once it awarded damages on the federal constitutional claim. Although it would have taken considerable sophistication for a pro se litigant to foresee the problem, Britton arguably should have objected to this instruction before the jury was discharged. Without a contemporaneous objection to preserve the issue on appeal, we can only reverse for "plain error," *M & I Heat Transfer Prods., Ltd. v. Gorchev, 141 F.3d 21, 23 (1st Cir. 1998)* (citing *Parker v. City of Nashua, 76 F.3d 9, 14 (1st Cir. 1996))*, under standards that are very high even in criminal cases, see *United States v. Olano, 507 U.S. 725, 733-37, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).* Pro se plaintiffs are not ordinarily judged by any different standards.

Yet in this instance, and with appropriate regard for the very unusual circumstances of this case, we think that the error is clear and that prejudice is almost certain. See *Drohan*

v. Vaughn, 176 F.3d 17, 21 (1st Cir. 1999). Under the plain error test, the remaining question is whether this is the extremely rare case in which it can fairly be said that the result would create a miscarriage of justice or undermine the integrity of the judicial process. See *id.* We think that this is such a case, for in resolving conflicting evidence on liability, the jury effectively determined that Maloney initiated criminal proceedings against Britton without a legitimate basis. Its award of damages on the federal constitutional claim establishes without doubt that whether Maloney's conduct is described as a violation of federal or state law, he caused Britton to suffer substantial emotional distress.

At the same time, we cannot say with absolute certainty that absent the error, the jury would have awarded Britton damages on the malicious prosecution claim. Wrongful seizures and wrongful prosecutions are not identical concepts. We are even less sure that the jury would have awarded Britton exactly $200,000.00 if it had focused its attention solely on his state law claims. For us to order Maloney to pay that amount despite these uncertainties could conceivably run afoul of his Seventh Amendment rights. See *Hetzel v. Prince William County, 523 U.S. 208, 118 S. Ct. 1210, 1211-12, 140 L. Ed. 2d 336 (1998)* (per curiam) (citing, inter alia, *Dimick v. Schiedt, 293 U.S. 474, 486, 79 L. Ed. 603, 55 S. Ct. 296 (1935)).*

The parties have not provided us with any argument or authority on how to handle the problem. But in our view, the best resolution of the error is to direct a new trial on damages pursuant to our general authority to fashion a remand in the interest of justice. See *28 U.S.C. § 2106.* The new trial shall be limited to determining compensatory damages for the emotional distress that Britton suffered because of the initiation of baseless charges against him. See *supra* note 1. In the interest of fairness, neither party will be allowed to conduct further discovery or to present new kinds of evi-

dence or additional witnesses not offered during the original trial, to prove or rebut these damages.

V.

We must now consider whether the district court erroneously granted summary judgment and judgment as a matter of law against Britton on some of his other causes of action. We review these decisions de novo. See *St. Hilaire v. City of Laconia, 71 F.3d 20, 24 (1st Cir. 1995)* (applying de novo review to the grant of summary judgment pursuant to Fed. R. Civ. P. 56); *Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 27 (1st Cir. 1998)* (applying de novo review to the entry of judgment as a matter of law pursuant to Fed. R. Civ. P. 50).

A.

Britton's attempt to revive Counts 1, 12, and 14 of the Amended Complaint can be disposed of in short order. The district court only certified Britton's case against Maloney as a separate and final judgment from which an immediate appeal could be taken. See Fed. R. Civ. P. 54(b). But Count 1 of the Amended Complaint does not implicate Maloney at all. It alleges instead that the City of Boston, the mayor, and the police commissioner are liable for maintaining an unconstitutional policy with respect to the seizure of firearms. With Britton's case against the city still pending, the district court's decision to grant summary judgment against him on Count 1 falls outside the scope of the instant appeal.

Nor does the district court's decision to enter summary judgment against Britton on Counts 12 and 14 of the Amended Complaint relate to Maloney either. These causes of action seek to hold an unidentified police officer and his "co-conspirators" liable for the seizure of Britton's ammunition clip, car keys, rifle stock, a box of ammunition, and a motor vehicle registration. Britton admitted at trial that it

was someone other than Maloney who removed the ammunition clip and car keys from his pocket. He offered no evidence to suggest that Maloney was responsible for taking the other items. As the district court noted when ruling on Maloney's post-trial motion for judgment as a matter of law, it was Dooley who removed those other items from Britton's car. See *Britton v. Maloney, 981 F. Supp. 25, 32 (D. Mass. 1997).*

B.

Having narrowed the issues before us, we turn to whether the district court properly granted judgment as a matter of law against Britton on Counts 8 and 10 of the Amended Complaint. Count 8 seeks to hold Maloney and others liable for "falsely imprisoning [Britton] and depriving him of his constitutional right to be free from a deprivation of liberty without due process of law." Although the wording of this claim arguably implicates the right to procedural due process under the Fourteenth Amendment, Britton's appeal focuses entirely on whether the conduct complained of violated his Fourth Amendment rights. Britton contends that Maloney detained him at the police station against his will and that even after being allowed to leave, he effectively had to remain at the station if he wanted to get his rifle back.

Maloney arguably seized Britton by asking him to go to the second floor of the police station for questioning. Dooley had grabbed Britton's rifle out of his hands just moments earlier. Maloney arrived on the scene and asked Britton what had happened. After listening to his initial response, Maloney replied: "Let's go upstairs and talk about it." They proceeded through a metal gateway, up a flight of stairs, and into a squad room for questioning. At that point, perhaps no reasonable person would have felt free to leave. See *Michigan v. Chesternut, 486 U.S. 567, 573, 100 L. Ed. 2d 565, 108 S. Ct. 1975 (1988).* A jury could find that Britton

submitted to Maloney's assertion of authority over him, and thereby endured a seizure within the meaning of the Fourth Amendment. See *United States v. Sealey, 30 F.3d 7, 10 (1st Cir. 1994).*[6]

But it is equally apparent that if this was a seizure, Maloney was justified in effecting it. Britton entered the police station carrying an AR-7 rifle in his hand. The first officer to spot him thought that he was a gunman and pushed a panic button on her desk to get help. Dooley responded to this call for assistance by wresting Britton's rifle away. Maloney saw the ensuing struggle, joined in the fray, and clearly had probable cause to believe that some sort of crime had occurred.[7] Cf. *Astrada v. Howard, 979 F. Supp. 90, 96 (D. Conn. 1997)* (concluding that the police lawfully detained someone who walked into a police station with a loaded smoking gun, and that "had they decided to arrest [him], their decision to do so would . . . have been supported by probable cause"), aff'd, *152 F.3d 917 (2d Cir. 1998)* (unpublished table decision).

At that point, it was appropriate for Maloney to detain Britton for further questioning while his rifle was inspected, his FID card was examined, and a check for any out-

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[6] Britton was questioned about his rifle and released long before he was charged with assaulting Loughlin and Stampley. He was never arrested, detained, or otherwise deprived of his liberty pursuant to the assault charges once they were filed. In other words, even though Britton was detained at one point with respect to his possession of the rifle, he cannot argue that Maloney's subsequent decision to pursue baseless charges against him for assault resulted in a "seizure" for the purposes of his constitutional malicious prosecution claim. See *supra* pt. II.

[7] Although it turned out that the rifle was unloaded and that its stock had been removed, neither of these facts was necessarily apparent from the start. The police officers had cause for concern in any event, because Britton had an ammunition clip in his pocket.

standing warrants against him was performed. As soon as Britton had explained himself and the circumstances of the incident were sufficiently understood, Maloney allowed him to leave.[8] With these facts in mind, we cannot say that Maloney's decision to question Britton violated his Fourth Amendment rights. See *Elkins v. United States, 364 U.S. 206, 222, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960)* ("What the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").

Britton's claim that Maloney effectively forced him to stay at the station is equally untenable. Maloney admittedly decided to retain Britton's rifle "for safekeeping." But as Maloney observed during his testimony, his refusal to return the rifle "didn't mean [Britton] couldn't get it back at some other point in time by going through the department['s] procedures." Unlike an airline passenger who might need his luggage in order to continue traveling, see *United States v. Place, 462 U.S. 696, 708-09, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983),* Britton simply could have left and demanded the rifle back later -- especially because he had a receipt in hand. Because the seizure of his property did not amount to a seizure of his person, the district court properly granted judgment as a matter of law against Britton on Count 8 of the Amended Complaint.

C.

Count 10 of the Amended Complaint alleges that the seizure of the barrel and the action of the rifle itself violated Britton's "constitutional right to be free from [an] unreason-

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[8] Britton walked into the police station at about 5:20 PM. By 6:15 PM, Dooley had already prepared a report that documented what had happened. Although we do not know exactly how long Britton's interrogation lasted, it occurred entirely within the 55 minute span between his arrival and his departure.

able seizure of property without due process." As with Count 8, Britton's appeal focuses entirely on whether the conduct complained of violated his Fourth Amendment rights, even though the language of the claim arguably implicates the right to procedural due process under the Fourteenth Amendment. Britton contends that the confiscation of his gun constituted a "seizure" that unduly interfered with his "possessory interests in that property." *United States v. Jacobsen, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984)* (observing that the Fourth Amendment protects both the privacy interests implicated by a "search" as well as the possessory interests implicated by a "seizure").

At oral argument, Britton all but conceded that the initial seizure of the rifle was constitutionally valid, and we have little trouble reaching that conclusion. Britton walked into the police station carrying a firearm in his hands. The first officer to see him reasonably thought that he was a gunman. Dooley and Maloney justifiably took the weapon away in order to defuse what they perceived as a threat to their safety and the safety of those around them. See *United States v. Donlin, 982 F.2d 31, 34 (1st Cir. 1992)* (concluding that the need to protect public safety posed exigent circumstances justifying the warrantless seizure of a shotgun). As a result, the only issue before us is whether Maloney violated the Fourth Amendment by confiscating the rifle "for safekeeping" after the perceived "emergency" had been defused and Britton was allowed to leave.

We are told that under Boston Police Department Rule 311, a firearm that comes into the possession of a police officer while on duty must be submitted to a ballistics unit for testing. Although Britton is elsewhere challenging the constitutionality of this rule, the notion that Maloney's retention of the rifle constitutes an independent violation of the Fourth Amendment would seem to us to trivialize the gravity of constitutional torts, especially when only three days

elapsed between the time that Maloney seized the rifle and the time that it became evidence in a pending criminal proceeding. There are many instances in which the lawful seizure of property necessarily results in a brief delay before its return. It makes little sense to treat each of those delays as an actionable violation of the Fourth Amendment. See *Towers v. City of Chicago, 173 F.3d 619, 629 n.7* (7th Cir.), cert. denied, *145 L. Ed. 2d 150 (1999)*. We therefore sustain the district court's dismissal of this claim.

VI.

CONCLUSION

For the foregoing reasons, we affirm in part, reverse in part, and remand this case for further proceedings consistent with this opinion. Each party shall bear his own costs.

Affirmed in part, reversed in part, and remanded for further proceedings. Each party to bear his own costs.

APPENDIX B – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS FILED ON SEPTEMBER 26, 1997

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 93-11430-NG.

RANDY BRITTON,

Plaintiff,

v.

PATRICK J. MALONEY,

Defendant.

MEMORANDUM AND ORDER

* * *

GERTNER, *District Judge:*

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Appendix B

a. State Civil Rights Law
b. Abuse of Process

D. Remittitur
E. Damages Under the § 1983 Claim

I. INTRODUCTION

Before me are defendant Patrick J. Maloney's motion for a judgment as a matter of law (docket entry # 183), motion for a new trial (docket entry # 184), and motion for remittitur (docket entry # 184).

Plaintiff Randy Britton ("Britton") was then and is now pro se. Britton is an African-American man, who is a graduate of both West Point and the Harvard University Graduate School of Business. His goal was to work as a stockbroker in New York City. He alleged that several Boston police officers illegally seized a rifle he owned and then pressed false felony charges against him when he threatened to sue for its return. The felony charges, he claimed, had a substantial effect on his life, his well-being and his prospects. The officers denied these allegations.[1]

This case was tried before a jury from February 3, 1997, through February 12, 1997. The jury returned a verdict for the plaintiff on four of five counts against defendant Patrick J. Maloney ("Maloney") and awarded damages of $200,000.

Since the plaintiff was pro se and the issues complex, I invited the parties to suse their post-verdict motions to raise any concerns about the outcome which they believed were

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[1] The officers are Vincent K. Donohoe, Patrick J. Maloney, Thomas Dooley and James Wood. Wood's and Donohoe's motion for findings as a matter of law was granted. The jury only returned a verdict against Maloney.

significant. Maloney urges this Court to reverse the jury's verdict and enter judgment as a matter of law in his favor, or, in the alternative, order a new trial.

After review of the papers and the record, defendant's motions are DENIED.

II. FACTS ADDUCED AT TRIAL

On June 30, 1990, around 5:20-5:30 p.m., plaintiff Randy Britton entered the Boston Police Department ("BPD") headquarters at 154 Berkeley Street in Boston, carrying the unattached barrel and action portions of an AR-7 rifle. Essentially, Britton claims that the police took his rifle, illegally retained it and then brought false charges against him in retaliation for his threat to sue for its return.

A. Britton's Version

Prior to arriving at the police station, Britton and his daughter had been on their way to the Regional Census Headquarters for the United States Census Bureau, where he was employed.[2] Britton testified that while en route, he was chased by two individuals in a red car; the passengers -- he claimed -- pointed a gun at him. Fearing for his own safety and that of his daughter, Britton drove to the BPD Headquarters. He got out of his car and carried his daughter and the barrel and action portions of his rifle into the

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[2] Britton testified that his Census job required him to spend some time in the Roxbury housing projects. He felt he needed protection, so he decided to carry his unloaded rifle with him when he was working. It is undisputed that Britton possessed a valid Firearm Identification Card ("FID card") for the rifle.

building.[3] An unarmed patrol officer, Sandra Springer Glenn ("Springer"), was seated at a desk in the BPD lobby when Britton entered.[4]

Britton testified that he told Springer that he was being chased and needed help. About five minutes passed, and Britton became afraid that the people who had been chasing him would come into the police station. He left the lobby and stood in the building entrance. He saw a red car traveling around the block -- the same car that had chased him earlier. At this point, someone -- defendant Detective Thomas Dooley ("Dooley") -- came up and grabbed Britton from behind; Dooley was not in uniform. Dooley grabbed the barrel of Britton's rifle and began to pull.

As Britton let go of the rifle, he saw the red car circle around the block again; he told Dooley, "There they are. Those are the people who are trying to kill me." Britton said Dooley took the rifle and walked outside, towards the red car. A woman got out of the car,[5] and Britton observed Dooley speak with her. Sergeant Maloney then appeared.[6] Britton was escorted by Maloney and other unidentified officers

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[3] Generally, Britton kept the rifle underneath the front seat. The stock portion of the rifle remained in the car during the evening's events, until it was recovered by Detective Thomas Dooley.

[4] Springer said that when she saw Britton enter, she pushed an "emergency" button on her desk to summon aid. Soon after, two detectives came through the front door of headquarters. They secured Britton's rifle. Traumatized, Springer took a break right after the incident. She testified that she could not identify Britton as the person who had entered headquarters on June 30, 1990. All she could see at the time was the rifle.

[5] The passengers in the car were Tammy Loughlin a/k/a Tammy Carpenter ("Loughlin") and Tyrone Stampley ("Stampley").

[6] Both Maloney and Dooley were part of BPD's Drug Control Unit ("DCU").

to the second floor of BPD headquarters. At this point, Britton no longer had the rifle; it was in the hands of either Maloney or Dooley.

Britton, his daughter, and the officers went upstairs, where they remained for about thirty to forty-five minutes. Britton said that most of the ensuing discussion centered around his rifle, not the chase. He showed the officers his FID card, and requested that Maloney and Dooley return the weapon. A background check on the FID card revealed that it was valid. Nonetheless, Maloney and Dooley refused to return the rifle, and told Britton that the police would hold it "for safekeeping." Britton left police headquarters at 6:15 p.m. or 6:20 p.m.

When Britton left police headquarters that evening, he had a copy of an incident report filled out by Dooley. (Trial Exh. 1). Britton had asked for the report so that he could have proof that the officers had taken his rifle. The report narrated the events of the evening, as Britton had related them:

> Randy Britton observed standing in hallway of BPD HQ holding a 22 Caliber rifle A207588 AR-7 EXPLORER in his right hand; rifle taken from Randy Britton who states 2 occupants of red car MA 650 AAP did make threats against his person. *Tyrone Stampley DOB 10-24-62 B/M SS 014525860 Add 25* Weld St. Fram-MA also a W/F Tammy Carpenter W/F MIV rented from Nat Car Rental [illegible] William Murphy. Rifle held for safekeeping. Randy Britton advised to seek asst. at Dist.04 Det's unit.
>
> Firearm ID Card # H-(R)-694455

The "time completed" section on the incident report read 6:15 p.m., just shortly before Britton left. It listed the "type of

incident" as "investigation persons" and the victim as "Comm of Mass."

By the time he arrived home, Britton was frustrated and angry. He decided to complain about the way he had been treated at police headquarters. At 8:00 p.m., he called BPD headquarters and spoke with a Sergeant Norman Connor, who gave him the number for the Drug Control Unit ("DCU"). Britton then called the DCU and spoke with Maloney. Britton stated that he told Maloney that the seizure of his rifle was illegal because he had a valid FID card, and, more importantly, he said to Maloney, "I hope I'm not going to have to sue you to get my rifle back." (Day 3, page 47, lines 16-17).

Over the weekend, Britton said he "stewed over [the incident]." (Day 3, page 48, lines 1-2). On July 3, 1990, he went to the BPD Ballistics Unit to get his rifle back. Ballistics personnel informed Britton they did not have it. He then returned to BPD headquarters. He told the desk sergeant that he wanted to see a supervisor. A few minutes later, DCU Deputy Superintendent James Wood ("Wood") appeared. Britton explained to Wood what had happened on June 30, 1990, and said the seizure of his rifle had violated the Fourth Amendment.[7]

Maloney appeared and joined the conversation; Britton reiterated his complaints. Maloney then told Britton there were criminal charges pending against him for assault, based on the statements from Stampley and Loughlin. Britton was shocked. This was the first time Britton had ever

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[7] Wood testified that he recalled that the conversation had occurred, but not its specifics, though he recalled that Britton was "very upset about something" and was "very loud." (Day 4, AM Session, page 39, lines 17-19). During trial, I granted Wood's motion for findings as a matter of law.

heard that he was being charged with an offense of any kind.

In fact, Britton was charged with two counts of assault with a deadly weapon, one on Tyrone Stampley and one on Tammy Carpenter, based on an application for a criminal complaint, dated the same day as his encounter with Maloney -- July 3, 1990.

On September 25, 1990, the criminal charges against Britton were dropped for want of prosecution. (Trial Exh. 2). The rifle was not returned to Britton until that date.

B. The Officers

There was apparently a second incident report, which recounted allegations of misconduct by Britton, against Stampley and Loughlin, and which provided the basis for the July 3, 1990, complaint. The central question at trial was when -- in relation to Britton's threat to sue to get his rifle back -- the second incident report was drafted.

Both Dooley and Maloney testified that they spoke to Stampley and Loughlin together. According to the officers, Stampley and Loughlin said Britton had pointed his rifle at them while he was driving and threatened to shoot them. Moreover, Loughlin told the officers she was a prostitute and Britton had solicited sex from her on prior occasions, including that evening.

Notwithstanding this testimony, Dooley maintained that Britton had Dooley's incident report in his possession -- a report which did not mention any misconduct on Britton's part -- when he left headquarters. Maloney and Dooley testified that Britton left police headquarters around 6:20 or 6:25 p.m.

Appendix B

1. Dooley's Version

Dooley testified that he observed Britton's car arrive outside of police headquarters, as he walked into the building.[8] When he entered, he saw Britton standing in the lobby, holding the rifle. He struggled with Britton and took the rifle. Then Dooley removed the clip from Britton's pocket and, taking Britton's car keys, left the police station, drove Britton's car up onto the sidewalk, and removed the rifle stock, a box of ammunition, and the vehicle registration from the car. The rifle itself was unloaded.

Dooley testified that he and Maloney spoke with Stampley and Loughlin before 6:15 p.m., i.e. before Britton left. Thus, Dooley said he knew all about the allegations of assault before he gave a copy of his rather innocuous incident report to Britton. Indeed, Dooley testified that he even considered arresting Britton at that time, but decided not to out of concern for Britton's daughter. If he had arrested Britton, Dooley testified that Britton would have been cuffed and jailed. Allison, Britton's daughter, might then have been sent to Boston City Hospital. (Day 4, PM session, page 47, lines 1-25, page 48, line 12).

2. Maloney's Version

Contradicting Dooley's account, Maloney testified that he and Dooley spoke with Stampley and Loughlin between 6:20 p.m. and 6:25 p.m., after Britton left.[9] At some point

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[8] This testimony contradicted a portion of Dooley's answer, which had responded "Admitted" to a paragraph in Britton's complaint that stated, "within minutes, Detective Dooley came down from upstairs." The paragraph of Dooley's answer was read to the jury as the admission of a party-opponent under Fed. R. Evid. 801(d)(2).

[9]

after this conversation, Maloney filled out a "supplemental" incident report.[10] This report did not contain an entry for "time completed," nor was it ever given to Britton. It also listed "investigation persons" as the "type of incident," but listed the victim as "Stampley, Tyrone" and included the following entry:

> Additional info aforementioned Tyrone Stampley and Tammy Carpenter stated to officers that the suspect pointed his rifle out of his auto window at the victims in a threatening manner. Allegations were made to Det. Dooley and Sgt. Maloney on 6/30/90.

Maloney signed this report as the reporting officer, and Sergeant Vincent K. Donohoe ("Donohoe") signed it as duty supervisor.[11]

Although Maloney testified that he completed the applications for a criminal complaint that same night as Britton's visit to the station -- June 30, 1990 -- the date listed on the applications is July 3, 1990. Maloney claimed that he did not file the application directly with the Boston Municipal Court ("BMC"); instead, he testified that the application was probably placed in an "out box" at BPD Headquarters, to be sent on to the court.

The official charges against Britton resulted from a criminal complaint filed with the BMC on July 5, 1990. "Peter

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[10] Maloney testified that he filled the report out as soon as he finished speaking with Stampley and Loughlin.

[11] Donohoe testified that he did not search for the original report when he signed Maloney's supplemental report. During trial, I granted Donohoe's motion for findings as a matter of law.

Mugford/Maloney" is listed as the complainant. (Trial Exh. 4).[12]

Maloney did recall receiving a phone call from Britton on June 30, 1990, later in the night, but said he did not remember its substance.

C. Stampley's Version

Stampley and Loughlin arrived at the police station soon after Britton did. They did not enter BPD Headquarters, but remained outside. Stampley testified at trial. He admitted that he had been chasing Britton on June 30, 1990; Stampley thought Britton was someone he had experienced problems with in jail.[13] Stampley, traveling with Loughlin in his car, arrived at BPD Headquarters soon after Britton.

He denied that Britton ever pointed a rifle at him. He also testified that he never told the police that Britton had threatened him. (Day 3, page 23, lines 12-13).

Rather, Stampley testified that he explained to the police the chase had been a case of "mistaken identity." (Day 3, page 18, line 16). Stampley recalled speaking with the police for about five to ten minutes; he testified that he did not begin speaking with the police until about forty-five minutes after Britton arrived. He admitted, however, that his companion, Loughlin, spoke to the officers longer than he did. Stampley also said that Loughlin was a prostitute.

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[12] At trial, Maloney testified that Peter Mugford was the "Boston police officer assigned to the Boston Unit in the court." (Day 4, page 52, lines 6-8).

[13] At the time of the incident, Stampley was on parole.

Appendix B

D. Loughlin's Presence at Trial

Loughlin did not testify at trial. The Court issued a trial subpoena, and then an arrest warrant, but she did not appear in court.[14] The defense attempted to introduce the transcript of an examination it had conducted of Loughlin. This examination was not a deposition; while Loughlin was sworn, neither Britton nor anyone representing him was present. As such, it failed to meet the requirements of Fed. R. Evid. 804(b)(1) and could not be admitted.[15]

The jury did hear Loughlin's statements, however, through the testimony of the officers. The Court admitted these statements for non-hearsay purposes -- on the grounds that they related to the state of mind of the various officers[16].

E. The Jury Verdict

The Court submitted five counts to the jury: (1) the federal civil rights statute; (2) malicious prosecution; (3) the Massachusetts civil rights statute; (4) abuse of process; and, (5) intentional infliction of emotional distress. The special interrogatories asked the jury to determine liability for both Maloney and Dooley on all the counts. The jury returned a

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[14] During the trial, the defendants filed a motion for an order of contempt against Loughlin.

[15] Fed. R. Evid. 804(b)(1): "Former Testimony. Testimony given as a witness at another hearing of the same or a different proceedings, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the part against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

[16] An appropriate limiting instruction was given regarding the statements.

verdict against Maloney on all counts, except the intentional infliction of emotional distress claim, and awarded damages of $200,000. No liability was found against Dooley. The jury found that while Britton may have demonstrated prima facie liability on Dooley's part for abuse of process, Dooley was not the proximate cause of Britton's damages.

III. DISCUSSION

The defendant mounts several challenges specifically to the plaintiff's § 1983 claim. First, the defendant argues that the *42 U.S.C § 1983* count submitted to the jury failed to state a claim for which relief can be granted. Second, the defendant argues that there is insufficient evidence to support this claim. Third, the defendant argues that there were errors in the jury instructions submitted to the jury. I address claims (1) in Section (A) *infra*; (2) in section (B) *infra*; and claim (3) in section (C)(2) *infra*. In addition, defendant challenges the instructions procedure in general and various instructions on the state claims addressed in section C(1) and (2) *infra*.

A. Failure to State a Claim

To assert a viable claim under *42 U.S.C. § 1983*, a plaintiff must show that: (1) the conduct complained of was committed by a person acting under color or law; and, (2) the conduct deprived a person of clearly established rights, privileges or immunities secured by the Constitution or laws of the United States. Here, the defendant-officers acted under color of law; the dispute centers around the second requirement -- what clearly established federal rights were implicated.

The plaintiff makes two Fourth Amendment claims. First, he claims that his prosecution for assault with a deadly weapon without probable cause, and with all the adverse

consequences that flowed from it -- his emotional distress, loss of employment[17]-- violated his rights under the Fourth Amendment. Second, Britton claims the prosecution was retaliatory: the police officers fabricated criminal charges in retaliation for his assertion of a Fourth Amendment right to the return of his rifle.

The defendant maintains that there is no cognizable § 1983 claim deriving from the prosecution of Britton, relying on a recent Supreme Court decision that limits the scope of rights actionable under § 1983. In *Albright v. Oliver, 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994),* the Supreme Court affirmed a dismissal of the plaintiff's complaint on the grounds that the claim that an arrest without probable cause violated the Due Process Clause of the Fourteenth Amendment could not support a § 1983 cause of action.

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[17] A large part of Britton's case originally involved the effect the assault charges had on his employment. In 1991, Britton was terminated by his employer Donaldson, Lufkin & Jenrette Securities Corporation, a New York securities firm, when he failed to indicate on a New York Stock Exchange application for securities industry registration whether he had ever been charged with a felony. In its March, 1992, letter to Britton outlining the reasons for his termination, DLJ cited the incident involving the June 30, 1990, assault with a deadly weapon charges filed against Britton as one of three reasons for his termination. (Trial Exh. 37).

During the trial, however, it came to light that Britton failed to turn over any of his tax returns to the defendants, despite repeated requests for their production. As a result, the defendants were denied the opportunity to challenge the employment-related damages. Accordingly, I ruled that Britton was precluded from offering any testimony or evidence regarding any adverse impact the charges may have had on his employment. The only damages at issue in the case related to Britton's emotional distress. I instructed the jury that they should award damages, if any, only for the emotional distress Britton suffered as a result of the prosecution.

Appendix B

In *Albright*, Illinois authorities issued an arrest warrant for the petitioner charging him on the basis of a previously filed information with the sale of a substance which looked like an illegal drug. An informant had originally told the investigating police officer, Roger Oliver, that she had bought cocaine from one John Albright, Jr. The "cocaine" later turned out to be baking powder; the grand jury nevertheless indicted John Albright, Jr. for selling a "look-alike" substance. When the police officer went to serve the arrest warrant, he discovered that John Albright, Jr. was a retired pharmacist in his sixties and decided to investigate further. He then contacted the informant to determine whether the information really meant that the buyer was John Albright's son, Kevin. The informant confirmed that it was Kevin. Kevin Albright surrendered to the warrant, all the while denying his guilt. He was released on bond, with the condition that he not leave the state without the permission of the Court. Shortly thereafter, the Illinois court dismissed the criminal action on the ground that the charge did not state an offense under Illinois law.

Albright's claim was a narrow one. He sued the investigating officer, Detective Roger Oliver, for depriving him of substantive due process rights under the Fourteenth Amendment -- his "liberty interest" to be free from criminal prosecution not based on probable cause. Albright did not claim a violation of procedural due process guaranteed by the Fourteenth Amendment. Nor did he claim a violation of his Fourth Amendment rights, "notwithstanding the fact that his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment." *510 U.S. at 271.* The District Court dismissed the suit on the grounds that the complaint did not state a claim under § 1983. The Seventh Circuit affirmed.

Appendix B

1. The *Albright* Plurality

The Court's decision was splintered. Four Justices joined one opinion (Rehnquist, C.J., joined by O'Connor, Scalia, and Ginsburg, J.J.). Justice Scalia wrote separately; Justice Ginsburg wrote separately; Justice Kennedy wrote a concurrence, which Justice Thomas joined;[18] Justice Souter also concurred; and Justices Stevens and Blackmun dissented.

Essentially, the plurality held that there is no substantive due process right not to be charged with a crime without probable cause. The Court reiterated that the scope of substantive due process is quite limited; § 1983, it held, is "'a method for vindicating federal rights elsewhere conferred.'" *Id. at 271.* (quoting *Baker v. McCollan, 443 U.S. 137, 144 n. 3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979)).* At the base of the Court's holding lay its fear that plaintiffs might use § 1983 to expand rights not otherwise codified in the Constitution, transforming the statute into a cause of action for general unfairness. Hence, in the *Albright* case, the Court suggested that the only pre-existing right implicated was the Fourth Amendment's prohibition against unreasonable seizures, including arrests without probable cause. *510 U.S. at 274-75.* Since Albright alleged no Fourth Amendment violation; the Court affirmed the dismissal of the case.

2. Claims Left Open by *Albright*

Unfortunately, "[a]s many courts have observed, in many ways *Albright* muddied the waters rather than clarified

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[18] Justice Kennedy argued the case should be viewed under *Parratt v. Taylor, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).* Since the deprivation of Albright's rights was random and unauthorized, and an adequate post-deprivation state tort remedy remained, i.e. a state malicious prosecution claim, there was "no basis for intervention under § 1983." *510 U.S. at 285.*

them." *Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996).* One court has referred to the melange of opinions as "the *Albright* minefield." *Reed v. City of Chicago, 77 F.3d 1049, 1052 n. 3 (7th Cir. 1996).* In addition to the assortment of opinions, the plurality's discussion of the content of a Fourth Amendment claim was dicta, since Albright never alleged such a violation.

What was clear about the opinion, at the very minimum, is this: It instructed plaintiffs to rely on a particular constitutional amendment -- typically, the Fourth Amendment -- as a gateway to allege a malicious prosecution claim under § 1983. *510 U.S. at 273.* "We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Id.*[19]

But precisely what the plurality meant to include by its reference to Fourth Amendment claims is not so clear. To be sure, the plurality seems to have envisaged such claims almost exclusively in the context of false arrests. Referring to the potential claims for "pretrial deprivations of liberty," the plurality cited *Gerstein v. Pugh, 420 U.S. 103, 114, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975),* which held that the Fourth Amendment required a judicial determination of probable cause for any extended deprivation of liberty following an arrest. *510 U.S. at 273.*

But what of the plaintiff who is not arrested, but only charged, who, as a result, loses employment or suffers other "palpable consequences?" *Albright v. Oliver, 975 F.2d 343, 346-47 (7th Cir. 1992).* Is he left without even a Fourth Amendment claim?

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[19] The Fourth Amendment was made applicable to the states through the Fourteenth Amendment. *Ker v. California, 374 U.S. 23, 30, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963).*

Just so, the defendant contends. The defendant asserts the plurality's decision eliminates any cause of action simply because Britton was not arrested. *510 U.S. at 274* ("petitioner was not merely charged; he submitted himself to arrest"). If "seizure" under the Fourth Amendment means only arrest, then Britton could not have been seized because he was not arrested.

This interpretation is deeply troubling. It removes the "heavy weaponry" of federal constitutional litigation, *975 F.2d at 347,* from a situation where a police officer was found by a jury to have concocted probable cause, to silence a citizen's complaint. It permits police officers who go so far as to fabricate charges in an official court proceeding, put a citizen at risk of conviction, and the loss of liberty, jeopardize his employment, consume his time and resources, but stop short of arresting the person, to evade § 1983 accountability. Why wasn't Britton arrested on the night of June 30, 1990? One answer lies in the jury's verdict: Maloney and Dooley did not have probable cause to do so. Using the defendant's approach, the real harm would remain unredressed: the activation of the criminal justice system through invented charges, the blatant abuse of official power, and the significant consequences flowing therefrom.

I do not believe that the *Albright* decision went so far.

a. Justice Ginsburg

Justice Ginsburg's opinion constitutes the only attempt in the *Albright* array to flesh out the scope of a Fourth Amendment claim without an arrest. While Justice Ginsburg joined the plurality opinion, she wrote separately to argue that in considering an *Albright*-like Fourth Amendment claim, "seizure" should be construed broadly.

In Justice Ginsburg's view, a defendant is "'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *510 U.S. at 279.* As a result, a plaintiff's claim for unlawful seizure -- even viewed through a Fourth Amendment lens -- could extend beyond the initial contact with law enforcement and in situations not involving an arrest.

In support of this position, Justice Ginsburg relied on precedents in the common law, as well as the practical implications of pending charges:

> A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely and he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

Id. at 278.

b. Justice Souter

Justice Souter's concurrence also discusses the claims that remain in the wake of the plurality decision. He pointed out that Albright had failed to show "substantial deprivation of liberty [that stemmed] from the mere initiation of prosecution," rather than from the arrest. *Id. at 291.* He did, however, suggest there could be an "exceptional cases in which "some quantum of harm occurs in the interim period after

groundless criminal charges are filed but before any Fourth Amendment seizure." *Id.*

c. Justice Stevens

In dissent, Justices Stevens and Blackmun contended that "the initiation of a criminal prosecution, regardless of whether it prompts an arrest . . . is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection." *Id. at 295.* Consequently, they concluded that the Due Process Clause protects individuals "by guaranteeing that no criminal prosecution shall be initiated except on a finding of probable cause." *Id. at 302.*

3. Decisions After *Albright*

Prior to *Albright*, some circuits had recognized a cause of action under § 1983 for violations of substantive due process so long as the case involved some variant of "egregious misconduct." *See, e.g., Torres v. Superintendent of Police, 893 F.2d 404, 409 (1st Cir. 1990)* ("egregious misconduct"); *Coogan v. Wilson, 820 F.2d 170, 175 (6th Cir. 1987)* (" egregious misuse"). Recently, however, the First Circuit recognized that *Albright* "would appear virtually to foreclose reliance on substantive due process as the basis for a malicious prosecution claim under section 1983 -- superseding even Torres' very limited tolerance of reliance on substantive due process in this area." *Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994).*

Courts considering the impact of *Albright* have at once highlighted the primacy of the Fourth Amendment and at the same time suggested that the presence of an arrest is not dispositive. *See, e.g., Whiting v. Traylor, 85 F.3d 581, 586 (11th Cir. 1996)* (holding that a plaintiff may assert a malicious prosecution claim under § 1983 so long as she can establish a "concrete violation" of the Fourth Amendment, envision-

ing an "actual, unlawful, forcible restraint of plaintiff's person"; "an unlawful seizure may include those associated with the prosecution [of charges]"); *Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995)* (holding *Albright* does not bar a plaintiff from asserting a federal claim for malicious prosecution under the Fourth Amendment so long as there is some deprivation of liberty consistent with the concept of "seizure").

In sum, *Albright* did not eviscerate all malicious prosecution claims brought under § 1983 that did not involve arrests. Simple vote counting supports this proposition: (a) the plurality allowed for claims under the Fourth Amendment, but did not define what they might consist of; (b) Justice Ginsburg enunciated a "continuing seizure" theory; (c) Justice Souter left room for an "exceptional case"; and, (d) Justice Stevens dissented.

4. Britton's § 1983 Claim

Britton's § 1983 claim falls within the territory left open by *Albright* in three separate ways: (a) Justice Ginsburg's "continuing seizure" theory; (b) Justice Souter's "exceptional case" theory; and (c) a line of cases -- not discussed in *Albright* -- which I will refer to as the "retaliation cases."[20]

a. "Continuing Seizure"

In this case, the criminal prosecution lasted two months. The charges against Britton were dismissed for want of prosecution. In between, and thereafter, the prosecution for

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[20] Britton has no procedural due process claim. The availability of an adequate state remedy in Massachusetts for malicious prosecution eliminates this claim. *Noel v. Town of Plymouth, 895 F. Supp. 346, 353 (D. Mass. 1995).*

a serious felony had a substantial deleterious impact on Britton's life -- including the loss of time and self-esteem, as well as the eventual loss of a job.[21] The following court dates were scheduled in the case: August 3, 1990; August 30, 1990; and September 25, 1990. *See* Trial Exh. 3. While Britton was not required to post bail, he did have to report for these court dates, or face the consequences.

According to the logic of Justice Ginsburg's concurrence, this two month period constituted a "seizure" of Britton. The police officers' decision to bring the mechanisms of the criminal justice system to bear on Britton implicates all of Justice Ginsberg's concerns. As a result of Maloney's conduct, a summons and complaint issued for Britton. The complaint effected a seizure since it involved a restraint on liberty. *Id.* Legal proceedings cannot begin until the state accomplishes this initial seizure; without the compulsive force of the state behind the summons and complaint, Britton would not have had to appear in court. Until Britton was free of the obligation to appear when and where the state commanded, under threat of contempt, the seizure continued.[22] Britton has a Fourth Amendment "right to be

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[21] While I did not permit Britton to present any employment-related damages to the jury, see n.18, *infra*, he was permitted to testify about the emotional impact of the charges and their sequellas. The evidence was that these charges formed at least part of the basis for Donaldson, Lufkin, and Jenrette's decision to terminate Britton's employment. See Trial Exhs. 34 and 37.

[22] In Justice Ginsburg's view, Britton was "seized" from July 3, 1990, until September 25, 1990, when the state could no longer compel his presence for court proceedings. Post-*Albright* courts have addressed Justice Ginsburg's position. See *Singer v. Fulton County Sheriff, 63 F.3d 110, 117 (2d Cir. 1995)* (holding post-arraignment deprivations of liberty could satisfy the requirement of seizure); *Cyprus v. Diskin, 936 F. Supp. 259, 263 n. 3 (E.D. Pa. 1996)* (noting Justice Ginsburg's "quite persuasive" observations); *but see Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989)* (rejecting the "continuing seizure" theory); *Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996)*

free of unreasonable or unwarranted restraints on personal liberty." *Singer, 63 F.3d at 116.* The criminal prosecution interfered with this right.

b. An "Exceptional" Case

Britton's case also features sufficiently unique circumstances to place it into the category of "exceptional cases" exempted by Justice Souter. While the short length of the pending charges might initially seem less than onerous, the harm is clearer when considered in light of the officers' retaliatory motive, discussed below; indeed, Britton endured "a harm of constitutional proportions." *Singer, 63 F.3d at 116.*[23]

c. Retaliation

Another right implicated in this lawsuit is the right not to suffer retaliation for exercising or threatening to exercise constitutional rights. Different courts place the source for this right in different constitutional amendments. *See, e.g., Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1986)* (noting that access to the courts to redress civil wrongs is often treated as a First Amendment right); *Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990)* (holding that actions taken to retaliate for fil-

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(noting "questions about the [continuing seizure] theory" but declining to reach a final decision).

[23] I admit that I find it difficult to imagine a situation where pending criminal charges would not exact severe harm. "The initiation of a criminal proceeding, regardless of whether it prompts an arrest, immediately produces 'a wrenching disruption of everyday life.'" *Albright, 510 U.S. at 295-96* (Stevens, J., dissenting) (quoting *Young v. United States ex rel. Vuitton et Fils, 481 U.S. 787, 814, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)).*

ing a civil rights lawsuit may violate First and Fourteenth Amendment rights).[24]

Britton could have sued under § 1983 to get his rifle back.[25] Britton was legally allowed to file a complaint to

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[24] As the Seventh Circuit has noted, "A First Amendment action is still possible [after *Albright*] because the First Amendment has been incorporated into the Fourteenth Amendment as a liberty interest." *Lawshe v. Simpson, 16 F.3d 1475, 1479-80 (7th Cir. 1994).* The fact that the Supreme Court focused on the role of the Fourth Amendment in Albright does not mean that claims based on other amendments are precluded. "It is theoretically possible . . . for a plaintiff to premise a malicious prosecution claim on some other constitutional right." *Singer, 63 F.3d at 115 n. 5.*

[25] The rifle was seized pursuant to a Boston Police Department rule. Rule 311 of the BPD Rules and Regulations outlines the procedure which Boston police officers must follow "[w]henever a firearm comes into the possession of a police officer, while on duty, by whatever means . . . " In essence, Rule 311 requires that a police officer who comes into possession of a firearm must complete an incident report and submit the firearm to the Boston Police Department Ballistics Unit. The Ballistics Unit is charged with maintaining custody of a seized firearm until it is returned to its owner or destroyed by court order.

The plaintiff claimed that the rule itself was unconstitutional since it requires police officers to seize any firearm which "comes into [their] possession," even when there is no probable cause for such a seizure. On the defendants' motion to dismiss, I held that, regardless of the interpretation of the rule, which was ambiguous on its face, the complaint was sufficient to raise the issue of its unconstitutional application. On summary judgment, however, based on a fuller record, I concluded that the facts suggested no basis for arguing that the initial taking of the rifle was unconstitutional, under the circumstances the need to check the *bona fides* of his possession; his story of strangers chasing him, etc. Its retention after the police confirmed a lawful FID and indeed, parts of his story, is another matter.

But the ultimate merits of Britton's seizure claim are irrelevant. In any event, even if the rifle was wrongfully held between June 30, the date of the incident, and July 3, the date of the criminal complaint, no damages flowed from that for Britton. The issue is his right to challenge the initial

challenge a seizure; he was legally allowed to verbally complain as well. *See Hall v. Ochs, 817 F.2d 920, 922 (1st Cir. 1986)* (holding that while Hall "clearly had a Fourth Amendment right to be free from unreasonable seizures of his person," he also had a "First Amendment right to access to the courts to vindicate his rights secured under state and federal law."); *Smart v. Board of Trustees, 34 F.3d 432, 434 (7th Cir. 1994)* (holding that "any form of official retaliation for exercising one's freedom of speech is actionable as an infringement of that freedom . . . Malicious prosecution has been held to be a form of harassment of which a plaintiff can complain on First Amendment grounds." (citation omitted).

The defendant claims that the Fourth Amendment is a "protective" right which cannot be chilled. This analysis fails to appreciate the logic of the retaliation cases. Unquestionably, the rights secured by the Fourth and First Amendments are "chilled" when valid challenges to police activity are met with the institution of criminal charges. Pre-*Albright*, the First Circuit implied as much:

[The plaintiff's] theory seems to be that defendants conspired to deprive him of his section 1983 right of action to seek redress for the unconstitutional use of force, and we may assume, without deciding that such an object, sufficiently advanced, could have amounted to an actionable deprivation of federally protected rights. *Landrigan v. Warwick, 628 F.2d 736, 742 (1st Cir. 1980)*. Nothing in *Albright* casts doubt on this position. Indeed, cases pre-*Albright* and post-*Albright* suggest the same theme. *See also Gehl Group v. Koby, 63 F.3d 1528, 1534 (10th Cir. 1995)* (holding charges filed in retaliation for the exercise of a constitutionally pro-

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seizure, and the officers' failure to return the weapon even after it was clear that it was lawfully possessed by Britton.

tected right are actionable under § 1983); *Gonsalves v. New Bedford, 939 F. Supp. 921, 927 (D. Mass. 1996)* (holding that when a defendant begins a cover-up to keep a civil suit from being filed and continues the cover-up once a case has commenced, a plaintiff may be entitled to recover under § 1983 for denial of adequate access to the courts);[26] *Cantarella v. Kuzemchak, 36 F.3d 1102, 1994 WL 529530,* *1 n. 2 (9th Cir. 1994) (unpublished opinion) (holding that exception for malicious prosecution under § 1983 exists when the prosecution "is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights.") (citation omitted); *Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990)* (holding arrest allegedly made in retaliation for filing a civil rights lawsuit sufficient to state a cause of action for retaliatory conduct in violation of plaintiff's First and Fourteenth Amendment rights); *Hampton v. Hanrahan, 600 F.2d 600, 622 (7th Cir. 1979),* rev'd in part on other grounds, *446 U.S. 754, 100 S. Ct. 1987, 64 L. Ed. 2d 670 (1980)* (holding that plaintiffs stated a claim for a violation of § 1983 when they alleged the defendants conspired to bring false charges in order to frustrate any possible redress and to conceal the true character of their activities).

The defendant argues that Britton's claims of illegal detention and illegal seizure were disposed of before this trial, depriving Britton of any suitable constitutional "peg" within

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[26] Courts have also endorsed this theory in prisoner civil rights cases. See *Milhouse v. Carlson, 652 F.2d 371, 373 (3d Cir. 1981)* (disciplinary proceedings allegedly brought against a prisoner in retaliation for having filed a civil rights lawsuit "if proven at trial, would establish an infringement of Milhouse's first amendment right of access to the courts."); *Goff v. Burton, 7 F.3d 734, 736 (8th Cir. 1993)* (same holding in context of retaliation for an inmate's lawsuit challenging the conditions of confinement); *Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990)* (same holding in context of retaliation for prisoner's "ongoing litigation and jailhouse lawyering").

Albright's limits. I do not agree. On the evening of June 30, 1990, Maloney could not have known that Britton's seizure claims would eventually be unsuccessful, so the "peg" on which Britton's malicious prosecution claim hangs is still a valid one.[27] Fundamentally, this aspect of Britton's case -- the right to enforce Fourth Amendment rights -- removes it from the concerns of the plurality in *Albright*.[28] The right which forms the basis for Britton's malicious prosecution claim was explicitly guaranteed by a specific textual command of the constitution, plainly "elsewhere conferred" within the meaning of *Albright*.[29] "The right of the people to

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[27] In *Albright*, Justice Ginsburg noted that the action against the charging officers may be "anomalous" since the actual prosecution is not accomplished by the officers. *510 U.S. at 279 n. 5.* This is not so when a jury has found that the charges were fabricated in an effort to squelch a threatened lawsuit. Officers who fabricate allegations in a criminal case cannot cloak themselves in the guise of prosecutorial immunity. *Senra v. Cunningham, 9 F.3d 168, 173 (1st Cir. 1993)* ("the chain of causation is broken if the filing of the information by the attorney at the state Attorney General's office was free of pressure or influence exerted by the police officers or knowing misstatements made by the officers to the Attorney General's office."). Here, Maloney completed the application for a criminal complaint, falsely, the plaintiff alleged, and it was forwarded to Peter Mugford, the officer assigned to the Boston courts. A summons and complaint issued on July 5, 1990. See Trial Exhs. 3 and 4.

[28] See *Gehl Group, 63 F.3d at 1535 n. 8* (discussing retaliation theory of malicious prosecution and noting "*Albright v. Oliver* . . . [is] not to the contrary . . . [the case] only involved challenges to police conduct based on the lack of probable cause and not based on the alleged abridgement of any other specific constitutional rights.")

[29] The First Amendment is also a right "elsewhere conferred." "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and petition the Government for a redress of grievances." U.S. Const., amend. I. Indeed, "a decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." *Wolford v. Lasater, 78 F.3d 484, 488 (10th Cir. 1996).*

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . " U.S. Const., amend. IV. Significantly, the amendment is broadly written. The drafters prohibited more than unreasonable arrests, they prohibited unreasonable "seizures." *See, e.g., Jean v. Collins, 107 F.3d 1111, 1115 (4th Cir. 1997)* (holding that *Albright* does not preclude a lawsuit based on *Brady v. Maryland* violations since "the right to disclosure of exculpatory evidence is grounded in the Due Process Clause itself.").

Viewed as the jury saw this case -- as a violation of the plaintiff's Fourth Amendment rights -- Britton's suit is not a diffuse substantive due process claim that the police treated him unfairly or engaged in a personal vendetta. E.g., *Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990)* (refusing to find a due process violation where officer had brought criminal charges against a resort owner as a result of a personal vendetta). The plaintiff claims the defendants, police officers, brought charges against him in retaliation for his invocation of the Fourth Amendment. As such, it is a claim

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This may also implicate yet another constitutional command: the Equal Protection Clause. See *Gehl Group v. Koby, 63 F.3d 1528, 1538 (10th Cir. 1995)* (discussing plaintiffs' claim that they were singled out for prosecution because of their exercise of a fundamental right; "such differential treatment could implicate equal protection concerns, just as it could First Amendment concerns.").

The plaintiff was *pro se*. He did not use the words First Amendment or Equal Protection. He did allege retaliation for the exercise of his constitutional rights. See Complaint at P 58 ("Because I objected to the illegal and unreasonable searches and seizures, and complained, first to Maloney and then to . . . Wood, I was falsely accused by Maloney."). Since I have found that the Fourth Amendment adequately states a claim, I need not address whether this claim could have been cognizable under a First Amendment or Equal Protection theory as well.

that strikes at the heart of both the civil rights statute and the underlying constitutional right.

B. Sufficiency of the Evidence

A Rule 50(b) motion for judgment as a matter of law, formerly known as a motion for judgment notwithstanding the verdict, cannot be made unless a prior motion for judgment as a matter of law, i.e. a motion for directed verdict, was properly brought before the court during trial.[30] *Javelin Investment v. Municipality of Ponce, 645 F.2d 92, 94 (1st Cir. 1981).* In this case, the defendant properly raised such a motion.

Judgment as a matter of law may be granted only when the evidence, viewed in a light most favorable to the nonmovant, is such that reasonable persons could reach but one conclusion. *Putnam Resources v. Pateman, 958 F.2d 448, 459 (1st Cir. 1992); Wagenmann v. Adams, 829 F.2d 196, 200 (1st Cir. 1987).* The defendant has failed to meet this standard.

Maloney has also moved, pursuant to Fed. R. Civ. P. 59, for a new trial. The standard for a new trial motion is often confused with that of a motion for judgment as a matter of law, but they are not the same. A trial court may grant a new trial "if she is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent direction of a verdict." *Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352-53 (4th Cir. 1941). See Coffran v.*

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[30] The 1991 amendments to Federal Rule of Civil Procedure Rule 50(b) eliminated the distinction between a pre-verdict motion for directed verdict and a motion for judgment notwithstanding the verdict. Both motions are now known as motions for judgment as a matter of law. *Putnam Resources v. Pateman, 958 F.2d 448, 459 n. 7 (1st Cir. 1992).*

Hitchcock Clinic, Inc., 683 F.2d 5, 7 (1st Cir.), cert. denied, *459 U.S. 1087, 74 L. Ed. 2d 933, 103 S. Ct. 571 (1982)* (citing test as whether the verdict is against "the clear weight of the evidence"); *Borras v. Sea-Land Service, Inc., 586 F.2d 881, 887 (1st Cir. 1978)* (citing test as whether the verdict is against "the great weight of the evidence"). Here too, however, the defendant has failed to meet the standard.

1. § 1983 Claim and Malicious Prosecution

The starting point for most post-*Albright* decisions is the common law tort of malicious prosecution, coupled with the violation of a pre-existing right, discussed above. *See Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 (1st Cir. 1995).*[31] The common law elements of malicious prosecution include the following: (1) the defendant must have instituted a criminal action against the plaintiff; (2) the prosecution must have ended in the plaintiff's favor; (3) there must have been an absence of probable cause to initiate the criminal proceeding; (4) the defendant must have acted maliciously. *Id. at 3 n. 5.* Tested by the standards of Rules 59 and 50, Britton established all these elements, as well as the violation of his Fourth Amendment rights.

a. Retaliatory Motive

A crucial fact in Britton's favor was that Maloney and Dooley testified to different chronologies for the evening of June 30, 1990. The disparities were key because both agreed that Britton was not informed of the assault allegations against him before he left police headquarters. Maloney said Britton was not informed of the assault charges because Maloney did not learn of the threats until after Britton

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[31] This section of the discussion applies with equal force to Britton's § 1983 claim and his state law malicious prosecution claim.

had left BPD Headquarters. In contrast, Dooley testified that he had all the information he needed to file charges and make an arrest before Britton left headquarters; he simply chose not to inform Britton. Dooley's incident report, given to Britton at 6:20-6:25 p.m., did not mention any allegations of assault.

But the Dooley report, obtained by Britton before he left BPD Headquarters, included personal information regarding Stampley and Loughlin, i.e. their addresses and driver's license numbers. As such, it confirms Dooley's chronology of the interviews that evening: Dooley *had* to have spoken with Stampley and Loughlin at least once *before* Britton left that evening because his report included this information. The report did not, however, contain any of the allegations Stampley and Loughlin supposedly made against Britton, i.e. solicitation of a prostitute or assault with a dangerous weapon. A reasonable jury could have viewed the failure to report this information on Dooley's report as suspicious, supporting Britton's argument that the charges were fabricated after he left and after he had demanded the return of his property.

Further, Dooley's explanation for the gaps in the report -- its failure to describe the accusations against Britton -- could well have been unpersuasive to a reasonable jury.[32] He said he wanted to be unbiased in his report, and he advised Stampley and Loughlin to go to the District 4 office and swear out a complaint against Britton. (Day 1, page 33, lines 24-25). In fact, Dooley said "they [Stampley and Loughlin] were going to go down to District 4 and fill out *their own* police report." (Day 1, page 34, line 13) (emphasis added). This report, the only Britton had when he left headquarters,

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[32] Maloney's explanation, as noted above, was that the officers did not learn about the assault accusations until after Britton left headquarters.

Dooley said, reflected the statements Britton made, nothing more. But the report listed "investigation persons" as its "type of incident." More importantly, the victim was not listed as Randy Britton, but as the "Comm of Mass" -- despite the fact that the report was supposed to reflect the statements that Britton had made. (Trial Exh. 1).[33]

Dooley never filled out another report detailing the allegations made by Stampley and Loughlin. Moreover, when he filled out the ballistics report later on the evening of June 30, 1990, concerning Britton's rifle, he noted that the "criminal charges pertaining to Ballistics Evid" as "ill. poss. firearm," not assault with a deadly weapon. (Trial Exh. 11). In any event, since Britton had an FID card for the rifle, illegal possession was an impossible charge.

A reasonable jury could have found the timing of the application problematic. If Maloney completed the supplemental incident report on June 30, 1990 (the report alleging a crime), why was it undated? And if Maloney completed the criminal complaint applications on June 30, 1990, why does the date on the applications read July 3, 1990?[34]

Deferring the question of the report, it is also unclear why the police did not even tell Britton about the accusations before he left BPD headquarters. As far as Britton knew, when he left the building that evening, the police had taken his rifle, for "safekeeping" -- a weapon which they conceded was legally in Britton's possession when he entered BPD Headquarters. On June 30th, nothing else occurred. This

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[33] In Maloney's report, the victim is listed as "Stampley, Tyrone."

[34] Maloney explained that he had placed the applications in the out box to be sent to Peter Mugford, the officer assigned to the Boston courts. This is, of course, one explanation for the delay, which a reasonable jury was not obliged to accept.

fact, combined with the lack of a "time completed" entry on Maloney's supplemental incident report, could well have suggested to a reasonable jury that the defendants decided to bring the charges after Britton left.

Indeed, on this record the jury was entitled to infer that Britton's litigious phone call triggered the decision to institute the charges. Britton threatened litigation in a phone call on the day of the incident, June 30, 1990: "I hope I'm not going to have to sue you to get my rifle back." By the July 3, 1990, visit to police headquarters, he was more explicit -- that the rifle's seizure violated the Fourth Amendment.

Finally, Stampley's testimony directly contradicted the officers' statements. Not only did Stampley testify that he chased Britton on that night -- an explanation making Britton's bizarre story entirely plausible -- he also said he never told the officers that Britton had threatened him with a rifle. While the defendant introduced Stampley's criminal record as impeachment (Trial Exh. 28), a reasonable jury could have concluded he was telling the truth. No evidence was introduced to suggest that Britton had offered Stampley any deals or inducements for his testimony. The jury could simply have decided that Stampley was a more credible witness than either Dooley or Maloney.

Some of the physical circumstances also favored the plaintiff's case. If it was Britton who had threatened Stampley and Loughlin, why would he seek refuge in BPD Headquarters? It seems an unlikely place to go if one has just committed a crime.

The defendant emphasizes that Stampley and Loughlin also traveled to BPD headquarters, arguing their presence at the station makes it improbable that they had chased and threatened to kill Britton. But Stampley admitted that he had been chasing Britton, so the fact that Stampley chose to

follow Britton to police headquarters only supports Britton's story.

A jury could also have considered the fact that Britton was not arrested to be significant, suggesting that the defendants had no information indicating that he had assaulted anyone that evening. Indeed, on February 11, 1997, during deliberations, the jury submitted five questions, one of which was, "Are people normally arrested for assault with a dangerous weapon?" (Trial Record, Docket entry # 189). While the defendants stressed the fact that Britton entered police headquarters with an unloaded weapon, the officers admitted that in their view, under the circumstances, this was not illegal. In any case, Britton was never charged with illegal possession of a firearm. Maloney testified that he found Britton's story unbelievable and that he felt the events of the evening inspired "a certain urgency, a certain need to bringing this before the court." (Day 6, page 57, lines 16-18).[35] Nonetheless, Maloney's urgency and skepticism did not translate into arresting Britton.

A reasonable jury could have asked the question: If Britton was so dangerous, and the officers were so worried that violence would ensue if he was permitted to keep the rifle, why allow him to leave the station at all with his five-year old daughter in tow?

b. Termination in the Plaintiff's Favor

The defendant argues that Britton did not prove that the prosecution terminated in his favor. Under *Wynne v. Rosen,*

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[35] The defendant continues to underscore the "violent and dangerous" confrontation that he believed had occurred before Britton arrived at headquarters that night. But Stampley testified that he was the person who had initiated any confrontation, and that Britton did not use his rifle to threaten anyone.

391 Mass. 797, 464 N.E.2d 1348 (1984), a plaintiff can meet this prong when "the district attorney formally abandons the criminal proceedings by a nolle prosequi or a motion to dismiss." *Id. at 800.* The reasons for the government's abandonment must be consistent with the "innocence of the accused." Id.[36]

The charges against Britton were dismissed for want of prosecution. *See* Trial Exhibit 2 (noting "Dismissed FWOP"). Stampley and Loughlin did not appear. Concededly, dismissal on a procedural or technical default does not meet the requirements for a termination in the plaintiff's favor. *Id.* But dismissal for want of prosecution is neither procedural or technical. *See Noel v. Town of Plymouth, 895 F. Supp. 346, 355 (D. Mass. 1995)* (holding that "dismissal of a case because of a named defendant's [sic witness'] failure to appear or because of the destruction or loss of exculpatory evidence does not constitute a procedural or technical default.").[37]

Want of prosecution is also neither a vague nor inadequate ground for dismissal. *See De Sa v. Sniger, 2 Mass. App. Ct. 819, 819, 309 N.E.2d 503 (1974)* (declaration which alleged only that a criminal complaint had been dismissed failed to adequately specify the nature of the dismissal and did not show termination in plaintiff's favor). There were no other possible charges. *See Guay v. Kappelle, 70 F.3d 1252 (1st*

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[36] In Wynne, the SJC formally abandoned the old Massachusetts rule -- which held that a *nolle prosequi* was insufficient for favorable termination -- in light of the "overwhelming support" for the more modern position that a *nolle prosequi* was sufficient. *Id.*

[37] Britton testified that the district attorney did not respond to a bill of particulars filed by his counsel. He also testified that Stampley and Loughlin -- the complaining witnesses -- failed to appear in court; there was no contrary testimony on this issue. The BMC court docket, Trial Exh. 2, simply says "Dismissal FWOP."

Cir. 1995) (holding doctor could not show underlying prosecution had terminated in his favor; though original plaintiff had lost on the negligence claim, he had still prevailed on a lack of informed consent theory). Nor was the dismissal undermined in any way by evidence of a settlement with the defendant. *See Simmons v. City of Brockton, 1994 U.S. Dist. LEXIS 18616, 93-12201 (D. Mass., Dec. 15, 1994), 1994 WL 725181,* *1 (holding plaintiff could not show termination in her favor since underlying criminal case was dismissed when she stipulated that she would not run an illegal boarding house in the future). The charge was serious -- it had been pending only two months; the final dismissal occurred on the date of the third court appearance. Yet, the prosecutor never sought leave to refile the charges or ask for a continuance to secure the witness' attendance. Dismissal in these circumstances favors Britton and is consistent with his innocence. Though the Massachusetts courts have not explicitly dealt with a malicious prosecution dismissed for want of prosecution, a parallel New York case is instructive:

> While there is certainly a distinction between a voluntary or formal abandonment by a prosecutor and a dismissal brought about by his neglect or unexcused failure to proceed, the difference is more apparent than real, for in both circumstances the criminal charges have been terminated by the prosecutor's non-pursuit of the charges against the accused. In each case, the failure to proceed to the merits compels an inference of such an unwillingness or inability to do so as to imply a lack of reasonable grounds for the prosecution.

Loeb v. Teitelbaum, 77 A.D.2d 92, 432 N.Y.S.2d 487, 494 (N.Y. 1980), modified on other grounds, *439 N.Y.S.2d 300 (1981)* (cited with approval in *Wynne v. Rosen, 391 Mass. 797, 800, 464 N.E.2d 1348 (1984)).*

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2. Abuse of Process

The "essential elements" of the state law tort of abuse of process are that: (1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." *Beecy v. Pucciarelli, 387 Mass. 589, 595-96, 441 N.E.2d 1035 (1982).* Such an action can lie against police officers who "use a lawful criminal process to accomplish an unlawful purpose." *See Santiago v. Fenton, 891 F.2d 373, 388 (1st Cir. 1989).* Even though Britton need not prove the groundlessness of the defendants' actions to support his claim for abuse of process, the SJC has stated, "that the person commencing the litigation knew or had reason to know his claim was groundless is relevant, however, as tending to show that the process was used for an ulterior purpose." *Fishman v. Brooks, 396 Mass. 643, 652, 487 N.E.2d 1377 (1986).*

The Supreme Judicial Court has also stated that an abuse of process claim fails when plaintiff does not demonstrate an "ulterior purpose." *Beecy, 387 Mass. at 589* (defendant's erroneous commencement of a collection action against plaintiff was insufficient to show the requisite ulterior purpose for a claim of abuse of process).

Again, the evidence before this Court was sufficient for a jury to find for Britton on the abuse of process claim. Charges were instituted; probable cause was lacking; and the nexus between Britton's threat and the filing of the charges provides the ulterior purpose.

3. State Civil Rights Claims

The Massachusetts Civil Rights Act is violated when a defendant, through "threats, intimidation, or coercion" seeks to interfere with the plaintiff's "exercise or enjoyment of rights secured by the constitution or laws of the United

States, or of rights secured by the constitution or laws of the commonwealth." Mass. Gen. Laws, ch. 12, § 11I. The close nexus between Britton's threat to sue and the filing of charges supports the jury's verdict that the defendant filed charges in an effort to intimidate the plaintiff into dropping any possible claims. Here too, Britton provided the jury with reasonable grounds upon which they could find that Maloney violated Britton's state civil rights.

C. Errors in the Jury Instructions

Pursuant to Maloney's motion for a new trial under Fed. R. Civ. P. 59, counsel makes a number of challenges to the instructions.

The defendant first makes what can be characterized as procedural challenges: He claims that there was no charge conference within the meaning of Rule 51, Fed. R. Civ. P., that written instructions were improperly submitted to the jury after they had been deliberating for two days, and that an amended verdict slip was improperly distributed, as well. In fact, not only was there a charge conference that met the requirements of the rule, counsel was given opportunities to object to and shape the instructions far, far, beyond that required by the rule or indeed, justified by his conduct. Counsel filed instructions late, repeatedly sought to raise objections during deliberations that he had never raised at side bar after the jury had been instructed, or even on the first day of deliberations with the Court's written instructions in hand, and now makes arguments never mentioned before at all, mischaracterizing the record, the rulings, and the issues to boot. The fact of the matter is that the Court adopted many of his objections -- however ill timed or inappropriately presented.

Counsel also challenges the content of certain of the instructions, apart from procedural issues. But these chal-

lenges cannot be separated from counsel's actions or more appropriately, his inaction. It is plain that the Court cannot consider on a motion for a new trial objections never raised at all during the trial. While the Court indulged counsel for Maloney while the jury was deliberating, when corrections or amendments to the charge could be still made, that indulgence has to stop. If counsel did not preserve the issue, it is gone.

If additional instructions responsive to counsel's objections were delayed, it is because counsel failed to mention them in a timely fashion. In any event, nothing in the record suggests that whatever "corrections" were given were too late.

If any party to this action is taking action too little, too late, it is counsel for the defendant.

1. Procedures Followed

a. Charge Conference

Defendant claims that "the Court provided its initial verbal instruction to the jury without any prior conference regarding what the substance of the instruction would be." Motion of Defendant, Patrick J. Maloney, For a New Trial or Remittitur, p. 4.

The claim is wholly without merit. Either counsel was not paying attention, or makes arguments without regard to what Rule 11, Fed. R. Civ. P. describes as a "belief formed after reasonable inquiry [that it is] it is well grounded in fact."

On Monday, February 10, 1997, at 10:10 a.m. the Court held a charge conference with the parties which met all of

the requirements of Rule 51. (Day 5, pp. 8-27.) Rule 51 provides:

> At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon requests prior to their arguments to the jury.

Typically, the requirement that counsel be "informed" about the proposed instructions is met by an oral charge conference in which the Court outlines its proposed instructions in order to give the parties an opportunity to object in a timely fashion. The Court did precisely that.[38]

In fact, the Court's usual procedure is far more elaborate but because of counsel's total disregard of the rules, the Court was unable to follow it in toto. Still, usual procedure or not, counsel had myriad opportunities to object -- pre-instruction, post-instruction, and during jury deliberations but pre-verdict.

i) The Court's Usual Procedure

The Court's obligation to instruct so that jurors can understand, and the Court's obligation to instruct on issues outlined by the Courts of Appeals sometimes collide. The safest procedure is to use the language of the appellate decisions;

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[38] Counsel for the defendant announced to the Court that the usual procedure for all courts was to give out written draft instructions to the parties. Day 7, pp. 10-12, 15. He made the same comment in his written submission. The short answer is that counsel did not know what he was talking about. The usual procedure, and the only one required by the law, was an oral conference.

at the same time, that language oftentimes is far too complex for a lay audience.

Accordingly, to accommodate both obligations, the Court submits a written draft of the instructions composed directly on the Court's computer, to counsel. (Indeed, at the pre-trial conference, counsel are asked to submit their jury instructions on disk so that their instructions can be "cut and pasted.") A written draft is distributed as early before closing argument as possible. Where possible, draft written instructions are faxed to the parties the night before the charge conference.

The purpose of this procedure is several fold. It enables the Court to translate legal language into simpler terms, with the approval of counsel. It enables counsel to weigh in, not only on the subject matter of the instructions, but also their language, the order of their submission, etc. It leads to a more informed charge conference, with all parties dealing with the same script. Then, after the Court has read from the instructions, the written version is distributed for counsel's final approval,[39] before submission to the jury. What the jury gets is more than simply a transcript of the Court's remarks. It gets the instructions with a table of contents, and formatted to make them easier to read.

The parties have several chances to review the instructions: before the charge conference when they get the draft written instructions; at the charge conference when the document is reviewed; at side bar after the instructions; and before the submission of instructions in written form to the jury.

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[39] This is intended to make certain that the Court's oral remarks did not diverge from the written comments, that there are no typographical errors in the written instructions, and that the format is appropriate.

It was especially important to follow this procedure in the *Britton* case. Mr. Britton was *pro se*. The Court relied on defendant's counsel to produce a full set of instructions in a timely fashion, and to correct errors inadvertently made. Counsel for the City did not cooperate at all.

ii) The Britton Procedure

The Court's pretrial order required a pretrial memo to be submitted to the court five days before trial, which memo was to include jury instructions. Trial started on February 3, 1997. Not surprisingly, the *pro se* plaintiff did not comply. What was particularly disconcerting is that counsel for the defendant did not bother to either.

On Thursday, February 6, 1997, both sides were asked for their instructions. Defense counsel stated: "I have jury instructions. They're back at the office, naturally." The plaintiff and defendant promised to file instructions the next day.

Instead, counsel for the defendant finally submitted instructions at 5:00 p.m. on Friday, February 7, 1997. As a result, the Court was unable to prepare written instructions in advance for submission to counsel. Supplemental instructions were submitted in the morning of February 10, 1997, moments before the closing arguments were to begin.

At the charge conference, the Court outlined its proposed instructions. The defendant and plaintiff asked for some changes and requested that the Court take judicial notice of certain items. The Court read the instructions from a draft which the Court had prepared over the weekend, with additional instructions from the charge conference. The Court made it clear that it would retype the instructions as she had read them, for submission to the jury.

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After the jury was instructed, the parties were given an opportunity to object at side bar. Defendant made very, very limited objections, at that time, pursuant to the rule, *all of which the Court-adopted.*[40] (*See* below.) No objections were made to the verdict slip at all.

The jury asked to be recessed early on Monday, February 10, 1997, shortly after being instructed. Before proceedings closed, counsel were informed that the draft written instructions would be faxed to counsel that afternoon, for submission to the jury the next day.

On February 11, 1997, counsel was asked to approve the instructions as written.[41] Apart from typographical errors, the only difference between the verbal instructions and the written instructions was that the latter had a more elaborate instruction on "malice." As noted below, while counsel had not provided instruction defining malice, he nevertheless objected to the Court's failure to give one at side bar. When he then made oral suggestions about how malice should be defined, the Court accepted them. On reflection, the following day, Tuesday, February 11, 1997, the Court suggested additional language to be included in the written instructions.

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[40] He objected to the malice instruction (see below) and offered refinements on the Court's probable cause instructions and instructions on battery. All of his suggestions were adopted.

[41] On February 11, 1997, the Court convened again in the morning. Due to some miscommunication with the Court's staff, however, the plaintiff was delayed and was not able to be present when the Court greeted the jurors and sent them to deliberate. Since the plaintiff was not present to acquiesce to the submission of the instructions in written form, the Court would not distribute them. It informed the jury that it would not receive the instructions as a result of secretarial problems. (Day 6, page 6-2, lines 13-24). Britton did not arrive until 11:45 p.m.

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Counsel objected to reinstructing the jury on anything, whether in written or oral form, before the jury asked questions. Written instructions were not sent in at the time.

Later that day, around 12:30 p.m., the jury submitted five questions to the Court,[42] none of which implicated the instructions, and asked to recess at 1:00 p.m. The Court, via its staff, told the parties to submit proposed answers to the jury's questions.

The next morning, Wednesday, February 12, 1997, counsel for the defendant, rather than proposing a response to the jury's questions, put forth entirely new objections to the jury instructions, which had been given orally two days before (Monday) and which he had in written form the day before (Tuesday). In addition, he repeated still older objections which had already been finally resolved by the Court (those based on *Albright v. Oliver*). What he was *supposed* to be doing -- proposing answers to the jury's questions -- he did not do.

The Court initially took the position that counsel could only make objections related to typographical errors, that he could not raise objections he had not raised at sidebar. In

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[42] The questions included the following:

(1) What does it mean to have a record sealed versus expunged?
(2) Is the transcript in this trial available to us?
(3) Is the Fourth Amendment the right to bear arms? If not what is it?
(4) Did the police have the right to keep a weapon after it is determined it is legal and no charges are brought?
(5) Are people normally arrested for an assault with a dangerous weapon?

See Trial Record, docket entry # 189, Questions submitted on February 11, 1997 at 12:30 p.m.

fact, the Court relented.[43] By Wednesday morning's conference the Court heard and noted any and all objections, raised at the appropriate time or not, after thoughts or not. Day 7, pp. 9-20.[44] Conferring with counsel, the Court outlined the answers to the jury's questions, indicated that the jury would be orally reinstructed on malice and probable cause (an instruction defense counsel urged) and that these new instructions would be submitted along with the rest of the written instructions. (Day 7, page 6, lines 9-15). Counsel *did not* object to the submission of written instructions at this time.

To summarize, by the time of the verdict, this defense counsel had four opportunities to object, before instructions as usual, after instructions at sidebar, after Tuesday's draft of written instructions, and Wednesday's draft of written instructions. To suggest in these pleadings that the procedure did not meet the requirements of Rule 51 is absurd.

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[43] "I am essentially giving you an opportunity that few lawyers are given, which is an opportunity to object to instructions three days after the fact." Day 7, p. 15.

[44] These objections mainly related to the state law claims. First, the defendant objected to the inclusion of "battery" with assault; the Court agreed to delete "battery." (Day 7, page 13, lines 21-25). Second, the defendant objected to the inclusion of "fear of bodily injury" in the Court's definition of assault; the Court agreed to remove it. (Day 7, page 15, lines 18-21). Third, the defendant objected to the "abusive and derogatory language" instruction with respect to the plaintiff's state civil rights claim; the Court agreed to remove that as well. (Day 7, page 18, lines 12-13). Finally, the Court agreed to add "without belief by the accuser in the guilt of the accused" to the definition of malice, (Day 7, page 19, lines 19-20), and to warn the jurors that "if you find there was probable cause to proceed against Mr. Britton, you may go no further." (Day 7, page 27, lines 11-12).

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b. Submission of Written Instructions

Counsel argues the written instructions that were given to the jury on Wednesday were too late -- since they had already started to deliberate.[45] In addition, he challenges the fact that not every oral instruction was given to the jury in the written copies -- e.g. instructions regarding the burden of proof, the special rules for party-admissions and depositions.

Neither of these objections was made at the time of submission of the written instructions on Wednesday and in any case, are not a valid basis for asserting error under Fed. R. Civ. P. 51. Defendant never asked that *all* the instructions be given to the jury. The Court's practice, announced from the outset, was only to submit written instructions on the substantive law.

On Wednesday, February 12, 1997, defense counsel agreed to sending all written substantive instructions. While counsel had objected to reinstructing the jury on malice and the submission of written instructions on Tuesday,[46] by the next day he changed his mind; in fact he suddenly wanted additional instructions on malice and a host of other changes which he had not mentioned at side bar.

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[45] Counsel claims that the Court erred on February 12, "in submitted (sic) written instructions to the jury over defendants' objection when the jury had already been deliberating for two days." Motion of Defendant for a New Trial, p. 4.

[46] Counsel objected because it "would constitute reinstructing the jury when they don't have a question." (Day 6, pages 6-4, lines 20-21).

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c. Submission of an Amended Verdict Slip

At 3:55 p.m. on February 12, 1997, the third day of deliberations, the Court reconvened. A juror had an appointment in Cambridge and wanted to be dismissed for an hour and return to deliberate. The jurors had also submitted a question to the Court: "Is the definition of prosecution strictly limited to the act of bringing charges?" (Day 7, page 33, lines 20-21). In the middle of the conference on this question, defense counsel - as was his usual procedure by then - focused not on the question, but on the special interrogatories that had been submitted to the jury days before, a form which he had had for several days.

The special interrogatories asked the jurors: "Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick Maloney violated the plaintiff's federal civil rights by prosecuting him without probable cause and with an unconstitutional motive on July 3, 1990?" The questions relating to the plaintiff's other claims used the same form and language. Defense counsel pointed out that there was a dispute in the case about *when* the charges had been filed and objected to the inclusion of the particular date, July 3, 1990, in the interrogatories.

When the Court asked defense counsel why this objection was being raised for the *first time* on the afternoon of the third day of deliberations, counsel represented that he had not yet had the opportunity to put this objection on the record. The Court had provided counsel with *three* other opportunities to put objections on the record, and he did not: February 10, 1997 (immediately after instructions);[47] February 11, 1997 (in the morning); and, February 12, 1997 (in the morning). Indeed, on the morning of February 12, 1997, de-

[47] The parties had copies of the special interrogatories at this point.

fense counsel had said, "yesterday, I requested an opportunity from the clerk to be heard on the special verdict form. I had submitted a special verdict form." (Day 7, page 7, lines 18-19). The issue was not his preferred language; the issue was his objections to the Court's version. Defense counsel had not been shy about submitting additional written materials during the three days; nothing prevented him from highlighting this issue in writing.

Despite the lateness of the defendant's objections, the Court adopted them -- again. The Court not only pointed out the factual dispute to the jury (concerning the day that charges were brought) and instructed them that the original verdict slip should in no way weigh in on their deliberations, but also distributed an amended verdict slip that met with everyone's approval, and took back the original form.[48]

2. Substantive Challenges to the Instructions

a. Malice

Defense counsel indicates that he had objected to the verbal "malicious prosecution" instruction in that it did not provide a definition of "malice." He then suggests that the court's written instructions concerning malicious prosecution were deficient because the Court did not refer to malice in the section defining a section 1983 claim. (Motion for a new trial, p. 7). Finally, he objects to the content of the instruction provided in writing and orally on February 12, 1997. Counsel's claims are without merit. However, because

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[48] The Court warned the jury, "There is a dispute in this case as to when the charges were brought. Each side takes a different position as to when the charges were actually brought. This verdict slip in no way weighs on one side or the other of the dispute." (Day 7, page 37, lines 13-17).

they dramatize the problems occasioned by counsel's negligence, they are worth describing in some detail.

Again, the short answer is that, as noted above, counsel did not provide the Court with *any* definition of malice, and when the court supplied her own, never objected to its *content or placement* in the instructions.[49]

The colloquy at the close of the instructions, is instructive:

> Defense Counsel: And I mean, that's related to the first thing I said. I suppose, I mean, not exact words but something to that effect, when you talk about malicious prosecution, you didn't define malice.
>
> The Court: No. Nobody gave me a malice instruction. Would you like me to?
>
> Defense Counsel: I think we have a written instruction on it as request No. 27 with respect to the abuse of process. We did say a mistake is not malice, it has to be deliberate. It's just -- in looking through we did not request the Court to define malice to the jury but now that I've heard the instructions, I think the jury would like to know what the definition under the law is and certainly a mistake --

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[49] In request number 19, the defendants asked the Court to instruct the jury on the elements of malicious prosecution, with malice not defined at all, only the phrase "that the defendants acted maliciously." Two citations were included, though no specific word-for-word definition was submitted. Then, in request number 27, involving the elements of abuse of process, the defendants asked the Court to tell the jury only that "malice cannot be inferred from mere mistake."

The Court: No, you are absolutely right.

(Day 5, page 81, lines 1-15).

The Court then told the jury, precisely what counsel requested: that malice was more than mere mistake.[50] The defendant never asked for anything else or objected to what was given. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retired to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.")

By the next morning, the Court, on reflection, suggested to the parties that the definition of malice could have been clearer. In the written instructions that the Court proposed sending to the jury, that had been faxed to the parties the night before, the Court included a new definition of malice. (Day 6, page 6-3, lines 20-22):

> "Malice is more than mere mistake. It is the intentional wrongdoing of a wrongful act without just cause or excuse, with an intent to inflict injury. When probable cause is deficient, you may infer the existence of malice, but you are not bound to do so." (Day 6, pages 6-3, line 24, page 6-4, lines 1-5).

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[50] The Court's definition: "In addition, I described for you the outlines of malicious prosecution. I can only tell you that malice refers to -- just a second -- a state of mind of the defendant. I'm sorry -- a state of mind of the defendants which goes essentially -- cannot go beyond a mere mistake. Malice can be inferred from all the circumstances in this case. It really goes beyond simply a mere mistake. It goes to having ulterior purposes of the kind that I described. That's what I meant by malice." (Day 5, February 10, 1997, page 84, lines 20-25, page 85, lines 1-3).

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As noted above, defense counsel objected to giving any instruction on malice when the jury did not have a question. (Day 6, page 6-4, lines 20-21). The Court accepted this objection (Day 6, page 6-5, lines 5-6).[51]

The next day, counsel changed his mind. After the jury came back with five questions (significantly, none having to do with "malice"), counsel withdrew his objections to written instructions. The Court then proceeded to read the new malice definition to the jury (Day 7, page 27, lines 23-25, page 28, line 1), as well as other language suggested by counsel (see below, on probable cause).[52]

b. The Legality of Britton's Rifle, and his Carrying a Rifle.

The defendant asked the Court to instruct the jury that the plaintiff was not legally allowed to carry his rifle through-

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[51] Defense counsel attempted to have his copy of the instructions faxed over by the Court "marked for identification," but the Court refused, cautioning counsel that "the only objections that I will allow on the record are the objections that you put on the record yesterday." (Day 6, page 6-6, lines 11-13). In response, defense counsel noted that one objection at the sidebar after oral instructions had related to malicious prosecution, and if the jury did come back with a question on that topic, he had some material he wanted the Court to consider. (Day 6, page 6-6, lines 15-18). Why those materials were not presented to the Court at the sidebar was not explained. In any event, it was clear that the Court relented and permitted objections whether raised on a timely fashion or not. *See above.*

[52] He also objects to the sentence "When probable cause is deficient, you may infer the existence of malice, but you are not bound to do so." The Court had initially declined to give the instruction on Monday when Britton proposed it; when the malice instruction was reconfigured the Court, after additional research, reconsidered. In any case, defendant's claim makes no sense; if there is no probable cause here it is only because the jury concluded that the witnesses never alleged an assault. Fabricating probable cause plainly supports an inference of malice.

out Boston for "self-defense." The Court refused to give this instruction: First, Maloney conceded that it was legal for Britton to carry his rifle in his car and perhaps even into BPD Headquarters. He testified at trial that "within the strict meaning of the law, [Britton] was legal . . . The legality of it was not a question in my mind." (Day 2, page 82, lines 2-4).[53] Moreover, as Trial Exhibit 1 reflects, the police held the rifle for "safekeeping," not because it was illegally possessed. Indeed, when confronted with the fact that he had written "ill poss firearm" on the slip sent to Ballistics with Britton's rifle, Dooley claimed he made that entry since he "wasn't sure what the charges were going to be" -- despite his knowledge of the accusations of assault. (Day 2, page 51, lines 5-6).

Since the legality or illegality of the rifle did not relate to the charges filed against Britton, it was not relevant. *See Santiago v. Fenton, 891 F.2d 373, 388 (1st Cir. 1989)* (even if defendant-officers had probable cause to arrest plaintiff for throwing a snowball, jury could have found for plaintiff on the malicious prosecution claim since defendants specifically rejected the snowball incident as the basis for the prosecution). Maloney not only disclaimed the rifle as the basis for charging Britton, he disclaimed its illegality.[54]

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[53] Dooley's testimony on this issue was less clear. At trial, he said that he understood the FID card only allowed Britton to keep his rifle in his home and his place of business. (Day 2, page 34, lines 16-17). His statement, however, appeared to be based on a recent reading of the FID card statute -- law which was not current at the time of the incidents. (Day 2, page 37, line 15). It also appeared to rely on a rule that applied to the possession of pistols, and not to rifles. (Day 2, page 38, line 10). As a result, Dooley's opinion on this issue was confused. It was also less important, since Maloney was the ultimate decision maker with respect to the institution of the charges.

[54] Likewise, the Court refused to take judicial notice of what defense counsel characterized as statutes that limit the ability of citizens to carry rifles in downtown Boston. Counsel cited 269 § 12D which he character-

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3. Britton's Federal Civil Rights

Counsel objected to the submission of any federal civil rights claim, based on *Albright*, addressed *supra* and to the language of the instructions as given.

a. General Description of 1983 Cause of Action

In the instructions, the Court told the jury that a section 1983 claim involves three elements, that the person was acting under color of law, that the person was deprived of rights, privileges or immunities secured by the Constitution or laws of the United States and, that defendants' acts were the proximate cause of the plaintiff's damage. The Court then outlined the rights implicated in the plaintiff's civil rights claim, suggesting that it would explain each of these rights later on in the instructions.[55] The rights involved are, "1) the right to be free from being charged with a crime without probable cause to believe a crime was committed, and 2) the right to be free from unreasonable seizure of person and property, and 3) the ability to enforce that right." (Day 5, page 67, lines 17-22).

The defendant objects on the grounds that *Albright* eliminates any claims under either the first or third rights mentioned. As discussed at length above, I disagree. This case involved explicit Fourth Amendment issues, not diffuse substantive due process claims.

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ized as "prohibiting persons from carrying loaded rifles on public ways." It is clear that that statute was not the basis for the officer's actions. Moreover, Britton's rifle was not loaded.

[55] It is important to outline the elements first, and then explain. Moreover, when instructions are written and formatted, the jurors are able to easily see that the general will be followed by the more specific.

In addition, the defendant objects to the inclusion of the second right -- the right to be free from unreasonable search and seizure -- because all of the plaintiff's seizure claims -- the seizure of the rifle -- were disposed of before the trial of this civil rights claim. Whether the seizure of Britton's person or rifle later turned out to be valid, however, is irrelevant; the clear rule is that Britton had the right to challenge any such seizures.[56]

Defendant also objects to the instruction that there is a cause of action for taking steps that chill a Fourth Amendment right. I disagree, as described above.

b. Probable Cause

The defendant claims the Court's instructions regarding the definition of probable cause placed an unduly high burden on the defendant-officers. Concerning probable cause, the Court gave the following instructions:

> Probable cause is a legal term which means that the police officer who charged the individual must have sufficient facts which would warrant a reasonable man in believing that a criminal offense had been committed by the individual against whom the complaint was brought. A police officer is entitled to rely upon his own observations in determining whether or not probable cause for an arrest exists or information which is reasonably reliable which he may receive from others. Probable cause exists for

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[56] The defendant, in a footnote, observes that it would have been entirely appropriate for me to have instructed the jury that the detention and investigation of the plaintiff on June 30, 1990, was "entirely reasonable under the circumstances." Defense counsel never requested such an instruction, so it was not given.

> any criminal offense only if there is probable cause to demonstrate that the individual accused has committed each and every element of the criminal offense.
>
> Probable cause may not be based upon conjecture, speculation or surmise and it cannot be based on pretextual, or imagined, reasons.
>
> It must be based upon observable objective evidence or other objective factors of the individual's actions.

(Day 5, page 70, lines 12-25, page 71, lines 1-3) (emphasis added).

According to the defendant, the use of the word "demonstrate" is prejudicial error. Defendant argues the Court should have said "believe."

First, the word "demonstrate" does not mean "prove." It does not require that the jury find the defendants knew enough to establish the plaintiff committed a crime. It merely signified that the officers must have probable cause for all the elements of the crime. Moreover, in the first paragraph, the Court made clear that probable cause required that the officer "must have sufficient facts which would warrant a reasonable man in believing that a criminal offense had been committed by the individual charged." The sentence already used the phrase "probable cause" -- reasonable belief -- to demonstrate all the elements of the crime were present.

The defendant also complains about the Court's use of the term "pretextual," asserting that it invited the jury to peer into the minds of the defendants and discern their subjective motives. First and foremost, counsel never objected to the use of this word. In any event, this objection too falls

short of the mark. As noted above, the Court pivoted its definition of "probable cause" on the "reasonable man," not on what defendants Dooley and Maloney believed. Second, the Court focused on the fact that probable cause must be based on "observable objective events," and contrasted that with "pretext" or "speculation" or "imagined reasons." An officer cannot fabricate facts to create probable cause; the Court's use of "pretextual" was designed to explain this rule to the jury.

Moreover, the Court emphasized the centrality of probable cause to the plaintiff's case: "I have added a line that says, 'If you find there was probable cause to proceed against Mr. Britton, you may go no further. If there is probable cause, then you need not address the question of unlawful motivation." (Day 7, page 27, lines 10-13).[57] The jury's finding of liability proves they found the defendants did not have probable cause to bring charges against the plaintiff.[58] Probable cause is a question of fact; the jury's determination on this point is sound. Moreover, all of the "damaging" information concerning the plaintiff -- possession of the rifle, threats with the rifle, the allegations that Britton solicited a prostitute while with his five year old

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[57] This was a claim whose core was the concoction of probable cause. If the jury found that there was probable cause to prosecute then there was no basis for the claim.

[58] It is clear from the jury's verdict that it found the officers did not have probable cause to believe that Britton had committed an assault. The Court explained that if there was such probable cause, the jury could not proceed any further. The fact that they did proceed to determine not only liability, but also damages, demonstrates their rejection of the defendants' asserted probable cause. This finding also supports Britton's claim under the Fourth Amendment. Cf. *Roche v. John Hancock Life Ins. Co., 81 F.3d 249, 256 n. 5* ("Even assuming the vitality of such an approach [a Fourth Amendment view of *Albright*], the existence of probable cause vitiates any arguable Fourth Amendment claim.")

daughter -- were heard by the jury. The Court told the jury all this information was relevant to determine what the officers knew on June 30, 1990. Whether the jury either chose to disbelieve the officers' testimony or did not believe that the officers' knowledge and observations were sufficient is unimportant. The fact is that the jury found the defendants did not have probable cause to believe Britton had committed assault with a deadly weapon.

c. Inquiry into the Subjective Minds of the Officers

The defendant also asserts that the objective determination of probable cause required under a Fourth Amendment/ § 1983 claim precludes any malicious prosecution claim. The Fourth Amendment, he contends, does not involve any consideration of the officers' motives. Again, the defendant is incorrect.

While the determination of a Fourth Amendment violation per se, as in a motion to suppress, may involve only objective factors, a section 1983 retaliation claim is different. Indeed, the First Circuit has explicitly recognized that "actual motive sometimes does play a role in section 1983 actions." *Holland v. City of Portland, 102 F.3d 6, 10 (1st Cir. 1996)* (internal citation omitted). There may be probable cause to arrest, but arrest in fact was triggered only by a desire to chill First Amendment rights, or the enforcement of Fourth amendment rights.[59]

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[59] The Court recently heard the case of *Walsh v. Barkowski* (No. 94-CV-11438-NG) in which the police officer conceded that he had no intention of arresting the plaintiff, even though he had probable cause to do so. The plaintiff claimed that the arrest was triggered by her criticism of his behavior. Thus, although there may have been objective probable cause, the arrest and prosecution was allegedly motivated by something else -- and something improper.

Appendix B

Where as in this case, the only § 1983 theory involves the fabrication of probable cause, both in the retaliation claim (concocting probable cause in order to prevent Britton from suing to recover his rifle) and the Fourth Amendment claim (prosecuting without probable cause), then a finding that probable cause was objectively present would be dispositive. In other words, if Stampley and Loughlin had in fact told the officers that Britton had pointed a rifle at them, there would have been grounds to prosecute, and thus, on these facts, no basis for claiming retaliation.

Accordingly, when defense counsel asked for an instruction suggesting the centrality of an objective determination of probable cause, the Court gave it. The Court instructed the jury that if they found that the officers had probable cause to proceed against the plaintiff, they could go no further. There could be no inquiry into subjective motivation, unless the plaintiff proved that there were no objective facts underpinning the prosecution.[60] Probable cause was the first inquiry, and it was an entirely objective determination.

This case is different. The claim is that probable cause was fabricated for a retaliatory purpose. If there was in fact objective probable cause, then - at least in this case - there was no basis for the retaliation claim.

[60] This was clearly a two step process for the jury. The jurors were only permitted to confront the second question -- i.e. the officer's improper intent -- if the first question did not yield a negative answer: "If there is probable cause, then you need not address the question of unlawful motivation." (Day 7, page 27, lines 10-13). Following the Court's instructions, first, the jury was asked to look at all of the facts and circumstances known to the officers at the time and then determine whether they would "warrant a reasonable man in believing that a criminal offense had been committed by the individual charged." (Instructions at 4). Second, assuming the answer to the first inquiry was "No," then the jurors were to determine the motive of the officers.

Intent was a secondary inquiry if there were no probable cause.[61]

d. Causation

The defendant argues that it was "plain error" for the Court to use the phrase "determining or motivating factor" in the instructions. The defendant argues that the correct language should have been "primarily," i.e. that the plaintiff must prove that the charges were primarily filed for an improper purpose. While the word "determining" conveys the same idea, "motivating" does not. "Motivating" he contends, is a lower threshold.

The Court gave the following instruction to the jury on the issue of the relationship between the officer's state of mind, and the decision to prosecute without probable cause:

> If you find that the determining or motivating factor behind the prosecution of Mr. Britton is improper, you may find that the prosecution was a violation of

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[61] Defendant also claims that the instructions were inconsistent. First the Court said that if there was no probable cause, the jury should go no further. Then in defining malice the court said that malice means "primarily motivated by hostility and ill will, and without belief by the accuser in the guilt of the accused."

Once again -- the defendant requested both instructions, and never objected to the inconsistency now raised.

In any event, the two phrases are not inconsistent. If there is no probable cause, the jury must consider whether fashioning charges without probable cause was motivated by "malice." Although not likely on these facts, defendant could have argued that the pressing of charges was simply an error, that Loughlin and Stampley told them one story that night, and another later on, etc., not motivated by malice or connected in any way to the threat of litigation.

> Plaintiff's civil rights. A determining or motivating factor is one which caused the prosecution to occur and without which you find the prosecution would not have occurred. An improper motivation includes, in the context of this case, a motive to chill, prevent or deter one or more of the Plaintiff's rights, here, the right to enforce the Fourth Amendment. The Plaintiff need not prove that the Defendants' sole motive was to retaliate for the plaintiff's exercise of his constitutional rights. Rather, the Plaintiff need only show that this unlawful motive was a determining or motivating factor in making the prosecution.

(Day 5, page 71, lines 11-25, page 72, lines 1-3).

Words like "determining" or "motivating" signify the same kind of importance as does "primarily." What needs to be conveyed to the jury is the idea that without the improper purpose, the charges would not have been filed. The words chosen by the Court sufficiently conveyed this nexus.[62]

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[62] In *Scott-Harris v. City of Fall River, F.3d , 1997 U.S. App. LEXIS 594, 1997 WL 9102,* *14 (1st Cir. 1997), the district court instructed the jury that it could find for the plaintiff on proximate cause if the defendant's actions "[were] a substantial factor in bringing about the harm . . . It does not matter whether other concurrent causes contributed to the plaintiff's injuries so long as you find that the defendant's actions were a substantial factor in producing them. If defendant's actions were a substantial factor, then they were the legal cause or what we call the proximate cause." The First Circuit, while noting that no one had objected to these instructions, stated that it did "not mean to suggest that the particular instructions given here are problematic. To the contrary, they appear at first blush to comport with precedent." Id at n. 16.

It cited two other cases: *Furtado v. Bishop, 604 F.2d 80, 89 (1st Cir. 1979),* cert. denied, *444 U.S. 1035, 62 L. Ed. 2d 672, 100 S. Ct. 710 (1980)* ("When a person's conduct is a 'substantial factor and a material element' in bringing about a foreseeable injury, he can be held liable for that injury . . .

Moreover, any concern arising from the lack of the word "primarily" is offset by other instructions. Indeed, the definition of malice provided by the Court used the very words counsel wanted, that it must be "primarily motivated by hostility and ill will, and without belief by the accuser in the guilt of the accused." (Day 7, page 27, lines 23-25, page 28, line 1.)

e. Definition of Improper Motive

The defendant argues that the Court also failed to adequately define a term: improper motive. The Court instructed the jury that in this case, an improper motivation would include "a motive to chill, prevent or deter one or more of the Plaintiffs' rights, here, the right to enforce the Fourth Amendment." (Day 5, page 71, lines 21-23). Linking together several alleged instructional errors, the defendant hypothesizes that the lack of a proper definition for "improper," combined with the Court's "motivating factor" language, would have allowed the jury to find for the plaintiff even if the officers honestly believed that an assault had occurred, so long as part of the decision to charge relied on their desire to eliminate the plaintiff's threatened lawsuit. There is one crucial flaw in this logic: the jury could only find for the plaintiff if it found there was no probable cause. Whether the officers "honestly" believed an assault had occurred was not relevant because probable cause is an objective inquiry. If there was no probable cause -- which the

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This satisfied plaintiffs' burden of proving that it was more likely than not that defendants foresaw and helped bring about the transfers to segregation.") (citations omitted); and *O'Brien v. Papa Gino's of Am., Inc., 780 F.2d 1067, 1072 (1st Cir. 1986)* (holding it was "a factual question for the jury to decide whether, according to proximate cause analysis, the polygraph results were a "substantial factor" in the committee's decision to terminate [the plaintiff]").

jury implicitly found when it found in Britton's favor -- and the defendant instituted the charges to deter the threatened lawsuit, then the plaintiff met his burden.

4. Other State law Claims:

a. State Civil Rights Law

Defendant objects to the definition of "threats, intimidation and coercion." The instruction was:

> A threat simply means saying or gesturing, in effect, if you don't do this, then something bad will happen to you. Coercion is making someone do something they are unwilling to do. Intimidation is scaring someone into doing something or refraining from doing something that otherwise they would do.

He claims that the state civil rights cause of action must involve an actual or physical confrontation, citing to *Layne v. MCI, 406 Mass. 156, 158, 546 N.E.2d 166 (1989),* and *Longval v. Department of Correction, 404 Mass. 325, 535 N.E.2d 588 (1989).*

Again, counsel did not object, not at side bar, not ever.[63] In any event, more recent case law suggests otherwise. In *Langton v. Secretary of Public Safety, 37 Mass. App. Ct. 15, 636 N.E.2d 299 (1994),* the court denied summary judgment, in a case in which a prisoner maintained that prison authorities had threatened him with psychological testing, solitary confinement, and potential loss of parole after he sent a letter criticizing prison conditions.

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[63] He challenged a sentence about derogatory language or abusive language; it was excluded. Day 7, p. 16,p. 19. He did not make the claim he makes here.

b. Abuse of Process

Counsel challenges instructions which suggest that even lawful process implemented for unlawful purposes may be unlawful. The instructions said:

> For abuse of process, the plaintiff must prove that 1) process was used; 2) for an ulterior or illegitimate purpose, namely for a purpose other than that for which it was designed or intended; 3) which resulted in damage. An action for abuse of process can lie against police officers who use a lawful criminal process to accomplish an unlawful purpose.

Again, counsel did not object. Again, the instruction meets the requirements of state law. *See supra*, IIIB(2). *See also*, Restatement (Second) of Torts § 682, at 474 (1977).

Malicious prosecution and abuse of process are two different claims. To suffer malicious prosecution is to suffer damage based on a groundless or frivolous suit brought for an improper motive. To suffer an abuse of process is to suffer the consequences of legal actions which while having an adequate basis in law and fact are nonetheless manipulated by the defendant in order to secure a collateral advantage not within the scope of the law. *See* Harper, James & Gray, The Law of Torts, §§ 4.1, 4.9.

D. Remittitur

Defendant calls for remittitur pursuant to Rule 49 on the grounds that there was no evidence supporting an award of compensatory damages. As such, he argues, plaintiff is only entitled to nominal damages. The trial court has discretion to reduce the amount of the jury's award if such award is not "supported by the weight of the evidence." *Catullo v.*

Metzner, 834 F.2d 1075, 1082 (1st Cir. 1987). Here, the jury awarded Britton $200,000.[64]

In support, he cites *Davet v. Maccarone, 973 F.2d 22, 29 (1st Cir. 1992),* claiming it holds that damages for mental distress are only available under § 1983 when there is actual proof of "objective recognizable damages."

Davet does not stand for this proposition; instead, it holds that when a jury's decision on damages is based on a "credibility determination," neither a trial court nor an appellate court may set aside the jury's decision. *Id. at 30.*

In Davet, the plaintiff's evidence of damages consisted solely in his own testimony relating to the mental suffering and humiliation he experienced while under police custody; he presented no evidence of economic loss. The jury awarded no damages. The First Circuit refused to overrule the verdict and award damages, reasoning the jury had awarded no damages because it did not believe the plaintiff. *Id.* Here, Britton's evidence of damages also consisted solely of his own testimony relating to the mental anguish he suffered as a result of being charged with a crime.[65] He testi-

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[64] A trial court may also condition its grant of the motion for a new trial on whether the victorious party agrees to a remittitur (decrease) of its damages. A court may then issue a remittitur reducing the plaintiff's compensation to the amount "a properly functioning jury should have found." *Zayas-Green v. Casaine, 715 F. Supp. 15 (D.P.R. 1989).*

[65] The instructions specifically told the jury the limits on the plaintiff's damage claims, instructing the jury that if they arrived at damages, they could consider the following:

> 1. Any fear, anxiety, emotional or other mental distress or harm which the plaintiff suffered during or after the incident;
> 2. Any emotional upset, distress, anxiety or other mental harm which the plaintiff suffered as a result of the incident and the events which followed from it including his prosecution; and,

fied that he suffered severe emotional distress as a result of the charges. Like the jury in Davet, the jury in this case was free to listen to Britton's testimony and make whatever credibility determination it chose. But unlike the jury in Davet, this jury believed the plaintiff's testimony. Their decision to believe his testimony is not a decision I can question.

The defendant cites another case, *Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978)*, claiming Britton was not entitled to any damages because he did not offer any corroborating expert medical evidence concerning his mental distress. Again, *Perez* fails to support the defendant's argument.

In *Perez*, the trial court had awarded damages of only $1.00 per plaintiff, stating the award was "a symbolic" victory for the plaintiffs, since he found "the actual damages suffered by plaintiffs are minimal." *Id. at 24.* The trial court found that the plaintiffs, university students, had only been suspended for twelve days as a result of the defendant's

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3. Any humiliation, embarrassment, loss of self-respect or esteem or any emotional anxiety, mental harm, fear or mental anguish that the plaintiff has suffered up to the present time and may suffer, with reasonable certainty, in the future, as a result of the violation of his civil rights.

(Day 5, page 76, lines 19-25, page 77, lines 1-5.)

The instructions went on to caution the jury what injuries could not be considered:

> Damages based on the abstract value or importance of constitutional rights are not a permissible basis of compensatory damages. If you find that the plaintiff suffered no injury, no compensatory damages can be awarded.

(Day 5, page 77, lines 14-18) (emphasis added).

conduct. *Id.* Moreover, their records were to be expunged, and they did not lose credit for the academic semester. *Id.*

On appeal, the First Circuit affirmed, observing that, in the past it had "suggested that 'in a civil rights action a plaintiff who proves only an intangible loss of civil rights or purely mental suffering may . . . be awarded substantial compensatory damages.'" *Id. at 24.* (internal citations omitted). The court pointed out that the only evidence on damages involved the plaintiffs' statements of psychological harm, and on that record, it preferred to "respect the judgment of the district court as to appropriate damages in cases of this kind unless there is convincing evidence that the award was either too high to too low." *Id.*

All *Perez* establishes is that compensatory damages in § 1983 actions based solely on a plaintiff's mental distress are neither mandatory nor forbidden; whether or not to award them is entirely up to the factfinder. Indeed, one factor which potentially weighs in favor of damages is malice. In supporting the low damage award, the *Perez* court observed that it did not have before it "a case of officials acting out of malicious bad faith." *Id. at 25.*

Britton's case featured malicious bad faith; it also featured the bringing of formal criminal charges, which remained pending for two months. These differences make it clear that the harm he suffered was neither slight nor temporary. They more than justify the jury's award of compensatory damages and elevate the case several levels above *Perez.* Emotional distress can support an award of compensatory damages. *See Rowlett v. Anheuser-Busch, 832 F.2d 194, 204-05 (1st Cir. 1987)* (holding that plaintiff's testimony concerning his emotional distress, in combination with that of the psychiatrist, and with the jury's common sense judgment of the emotional complications the plaintiff suffered, provides an

adequate basis for the portion of the compensatory damage award attributable to emotional distress).

Britton testified that he had to miss classes at business school to attend court appearances; he recounted how he feared there would never be a resolution: "And I found it to be very distressful that false charges like that would be entered into the computer, become a part of the public domain, and anyone that sees that would think, at least at first blush, that I had done something wrong. And that was extremely distressing, and it affects me to this day." (Day 4, AM Session, page 83, line 25, page 85, lines 1-5). This testimony, while Spartan in length, certainly conveys the harms a reasonable juror would associate with being maliciously prosecuted. I see no reason to decrease the jury's award.

The defendant argues that Britton's failure to prevail on his intentional infliction of emotional distress claim precludes the recognition of any emotional damages. Not surprisingly, the defendant has cited no support for this argument because it is not the law. Damages based on credibility determinations are entirely within the province of the jury; they believed the plaintiff's testimony. At the same time, they simply could have chosen not to believe that Britton's distress "was severe and of a nature that no reasonable person could be expected to bear it," as required for intentional infliction of mental distress. (Day 5, page 75, lines 3-4).

E. Damages Under the § 1983 Claim

The jury found liability on four counts out of five, but only awarded damages under the federal civil rights claim, the first question on the amended special interrogatories. The single award was clearly an effort by the jury to follow the Court's instructions on double recovery:

> The Plaintiff is not entitled to a double recovery. Therefore if you award the [sic] Mr. Britton damages for the constitutional claims you may not award any more damages under the common law claims.

Britton's only claims involved mental anguish and suffering occasioned by the defendant's conduct. The same harms were addressed by all his claims: Section 1983, state malicious prosecution, state civil rights violations, state abuse of process, and state intentional infliction of emotions distress. Clearly, the plaintiff did not suffer a different kind of mental distress under the state claims than under the federal civil rights claim. The jury recognized the similar damages under all the counts and so it only awarded damages under the federal claim.[66]

SO ORDERED.

Dated: September 26, 1997

s/ Nancy Gertner
NANCY GERTNER
United States District Judge

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APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED ON DECEMBER 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Before
Boudin, Circuit Judge
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

ORDER OF COURT

Entered: December 23, 1999

The petition for rehearing en banc filed by plaintiff-appellant Randy Britton is, under this court's internal operating procedures, considered both by the panel and by the full court. Panel rehearing is hereby denied because, in the panel's view, rehearing would serve no useful purpose. We briefly address some of Britton's arguments, none of which warrants further consideration of this case.

Britton contends that even if he were not entitled to recover under the Fourth Amendment, he still should have a cause of action under the First Amendment or the Equal Protection Clause. Although the proceedings below made passing references to the First Amendment and Equal Protection Clause, the district court resolved the case in terms of the Fourth Amendment. Britton accepted this approach and adopted it in his post-trial submissions as well as his briefs and arguments before us. Under these circumstances, he has waived the claim. *See Irving v. United States*, 162 F.3d 154, 159 (1st Cir. 1998) (en banc) ("In the ordinary course, a party seeking to preserve a point for review must present it seasonably in *both* the trial and the appellate courts and offer developed argumentation in support.") (emphasis added), *cert. denied*, 68 U.S.L.W. 3222 (U.S. Oct. 4, 1999).

Britton also argues that we would have reached a different result if we had known that Britton had to post a bond as part of the criminal proceedings of which he complains. The existence of a bond was not argued during the proceedings below. When asked at trial to explain the circumstances of his criminal case, Britton testified that he "just waited and eventually a summons appeared in the mail." (App. at 599.) He specifically admitted that he was never arrested. (App. at 772.) The issue briefly arose when Maloney's attorney spoke in the arguments before us, and when given the opportunity to present his side of the case, Britton never said that he had been required to post a bond. He has waived any significance that the bond might have because "a party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990).

In any event, the only document that arguably makes reference to a bond is Trial Exhibit 3, which is a docket sheet from Britton's criminal proceedings in state court. Contrary

to what Britton implies in his petition, the document does not use the word "bond" at all. Although a handwritten line in the document might be read as "500 to Aug o--r--," it is impossible to tell whether this notation refers to a $500 bond, as Britton contends. It is worth noting that the copy of the document that the parties included in the record was barely legible. (App. at 1003.) Britton tries to cure this problem by attaching a more legible copy to his petition for rehearing, but even that copy is hardly clear.

The petition for panel rehearing is denied.

By the Court:
PHOEBE D. MORSE, Clerk

s/ Janice M. O'Neil
Janice M. O'Neil
Chief Deputy Clerk

cc: Mr. Britton, Ms. McCarthy

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED AND FILED ON DECEMBER 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Before
Torruella, Chief Judge,
Coffin, Bownes, Cyr, Senior Circuit Judges,
Selya, Boudin, Stahl. Lynch and Lipez, Circuit Judges.

ORDER OF COURT

Entered: December 23, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

Appendix D

It is ordered that the petition for rehearing en banc, be denied.

By the Court:
PHOEBE D. MORSE, Clerk

s/ Janice M. O'Neil
Janice M. O'Neil
Chief Deputy Clerk

cc: Mr. Britton, Ms. McCarthy

APPENDIX E - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT GRANTING MOTION TO FILE OVERSIZED PETITION FOR REHEARING DATED AND FILED ON DECEMBER 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Before
Boudin, Circuit Judge
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

ORDER OF COURT

Entered: December 23, 1999

Appellant's motion to file an oversized petition for rehearing is allowed.

Appendix E

By the Court:
PHOEBE D. MORSE, Clerk

s/ Janice M. O'Neil
Janice M. O'Neil
Chief Deputy Clerk

cc: Mr. Britton, Ms. McCarthy

APPENDIX F – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT GRANTING LEAVE TO FILE A SECOND PETITION FOR REHEARING AND A SECOND PETITION FOR REHEARING EN BANC DATED AND FILED ON JANUARY 27, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Before
Torruella, Chief Judge,
Coffin, Bownes, Cyr, Senior Circuit Judges,
Selya, Boudin, Stahl. Lynch and Lipez, Circuit Judges.

ORDER OF COURT

Entered: January 27, 2000

Upon consideration of Randy Britton's "Motion for Leave to File a Second Petition for Rehearing, Second Petition for Rehearing En Banc, and a Motion to Stay or Recall Mandate",

Appendix F

It is ordered that leave is granted to file the second petition for rehearing and rehearing en banc.

By the Court:
PHOEBE D. MORSE, Clerk

s/ Janice M. O'Neil
Janice M. O'Neil
Chief Deputy Clerk

cc: Mr. Britton, Polk, Na, Boyle, Ms. McCarthy, Ms. Hopkins

APPENDIX G – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING EN BANC DATED AND FILED ON JANUARY 27, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Before
Torruella, Chief Judge,
Coffin, Bownes, Cyr, Senior Circuit Judges,
Selya, Boudin, Stahl. Lynch and Lipez, Circuit Judges.

ORDER OF COURT

Entered: January 27, 2000

The panel of judges that rendered the decision in this case having voted to deny the second petition for rehearing and the second suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not

having voted to order that the appeal be reheard by the Court en banc,

It is ordered that the second petition for rehearing and second petition for rehearing en banc, be denied.

It is further ordered that the motion to stay or recall mandate is denied.

By the Court:
PHOEBE D. MORSE, Clerk

s/ Janice M. O'Neil
Janice M. O'Neil
Chief Deputy Clerk

cc: Mr. Britton, Polk, Na, Boyle, Ms. McCarthy, Ms. Hopkins

APPENDIX H – EXCERPTS FROM BRITTON'S POST-TRIAL MEMORANDUM OF LAW DATED AND FILED MARCH 17, 1997, OPPOSING MALONEY'S MOTION FOR JUDGMENT AS A MATTER OF LAW

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RANDY BRITTON,	)
Plaintiff,	) Civil Action
v.	) No. 93-11430-NG
PATRICK J. MALONEY,	)
Defendants.	)

PLAINTIFFS' OPPOSITION TO MALONEY'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Excerpts from Page 1

Boyle's frivolous Motion has no basis in law or fact; Boyle, as usual, has intentionally misstated both.

> A busy trial judge must rely on counsel to present the law, as well as the facts, accurately. That is the essence of our adversary system of justice. Trial judges simply do not have the time to research the law on every issue in a case, particularly in a lengthy, complex trial such as this one, which presented a plethora of legal questions.

Cordero v. De Jesus-Mendez, 922 F.2d 11, 15 (1st Cir. 1990).

It is clear that this Court cannot rely on Boyle's misrepresentations. Acting under the delusion that three times is a charm, Boyle has once again submitted the same old tired arguments that this Court has twice rejected.

Appendix H

Excerpts from Page 3-10

They have some nerve to file this motion. The jury was perfectly within its bounds to find for me based on the evidence that

> [t]he prosecutor's only information came from the police reports. There were glaring omissions from the reports; the officers presented contradictory accounts of the incident in [this] court; and independent witnesses confirmed the plaintiffs' version of the [event]. Given any of these circumstances, the jury was clearly entitled to conclude that the officers misrepresented the facts to the prosecutor and that these misrepresentations were responsible for the filing of the criminal complaint.

Barlow v. Ground, 943 F.2d 1132, 1137 (9th Cir. 1991).

There is no basis to disturb the jury's findings.

THE COMPLAINT AS WELL AS SPECIAL INTERROGATORY I(a) STATES A 42 U.S.C. § 1983 CLAIM FOR A VIOLATION OF MY CONSTITUTIONAL RIGHTS

Special Interrogatory I(a) merely asks

> Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick J. Maloney violated the plaintiff's **federal civil rights** by prosecuting him without probable cause **and** with an unconstitutional motive?

As the highlighted words indicate, no peg is designated[1] upon which to hang this claim; the term **federal civil rights** embraces all of the federal constitutional protections not just the ones to which Boyle seeks to limit me. Members of the United States Supreme Court have recognized that substance should overrule form in this inquiry as anything else places "undue weight on the label petitioner has attached to his claim" Albright v. Oliver, 510 U.S. 266, 301, 114 S.Ct. 807, 827 (1994)(Stevens, J., dissenting, Blackmun, J., joined) and transforms the whole process into a mere "pleading exercise". Albright at 510 U.S. at 285, 114 S.Ct. 807 at 819 (Kennedy, J. concurred in Judgment, Thomas, J. joined).

In this case, I alleged the full gambit of federal civil rights in the amended complaint, including the 1st Amendment, 4th Amendment, 5th Amendment, 14th Amendment as well as their state law counterparts at Article 12 and Article 14 of the Massachusetts Constitution. See Amended Complaint ¶¶ 44, 124, 132, 133, 140, 154, 166, 167, 178, 192-204.

> Several decisions of the Supreme Court had treated access to court to redress civil wrongs as a First Amendment right. See In re Primus, 436 U.S. 412, 422-32, 98 S.Ct. 1893, 1899-1904, 56 L.Ed.2d 417 (1978); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217, 223, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); cf. Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718

---

[1] "There is an embarrassing diversity of judicial opinion" about this issue that the Albright decision did not clarify with its plurality opinion in which 8 out of 9 justices put pen to paper. If the United States Supreme Court and the various Courts of Appeal cannot agree on the correct peg, why should we ask a jury to agree on the correct peg. It suffices that when the claim, like a coat, is tossed in the closet, it hangs on at least one constitutional peg instead of falling to the floor.

(1968) (protecting right to access to court on due process and equal protection grounds). And it was well established that a waiver of a constitutional right must not be coerced. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). It was no less self evident in 1980 than it is today that holding someone in jail until he waived the right to sue was coercive.

The right to be free from unreasonable seizures of the person was similarly well established by 1980, see, e.g., Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) and Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1960), as was the principle that the government may not impose unconstitutional conditions on the granting of a benefit. See, e.g., Frost v. Railroad Commission, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1925). The fact that no court had put these pieces together in the precise manner we do today does not absolve defendants of liability. No police officer reasonably aware of the law could have failed to appreciate that confining Bancroft Hall until he agreed to forfeit the right to sue violated his civil rights.

Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987).

Similarly, "No police officer reasonably aware of the law could have failed to appreciate that" bringing false charges that the police officer personally made-up out of whole cloth against an innocent man in an effort to intimidate, threaten, or coerce him " until he agreed to forfeit the right to sue violated his civil rights.

It does not matter what the constitutional peg or pegs are labeled upon which my constitutional claim hangs, as long as there is at least one such peg in the constitutional closet.

In this case, there was no shortage of pegs in the closet. Justice Souter wrote the following in his concurring in the judgment opinion:

> See United States v. James Daniel Good Real Property, 510 U.S. 43, ----, 114 S.Ct. 492, 495, 126 L.Ed.2d 490 (1993) ("We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another"); Soldal v. Cook County, 506 U.S. 56, ----, 113 S.Ct. 538, 548, 121 L.Ed.2d 450 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn")[2].

The majority of the Albright Court held that the Fourth amendment provided the properly labeled peg. Other members of the Albright Court--Stevens, Blackmun, and Souter--acknowledged that the protections violated **can be** hung on the pegs labeled the 5th and the 14th Amendments. However, the majority of the Court, Chief Justice Rehnquist, and Justices O'Connor, Scalia, Ginsburg, and Souter felt that because the Fourth Amendment explicitly and specifically addresses seizures of the person, it was not only **a** properly labeled peg upon which to hang Albright's claim but also the **only**[3] peg.

---

[2] The plurality took a different view holding that "Section 1983 is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." . . . .The first step in any such claim is to identify the specific constitutional right allegedly infringed." Albright at 510 U.S. 266, 271, 114 S.Ct. 807, 811 (1994).

[3]The Albright case is actually somewhat quirky in that it only forbids using a substantive due process peg to hold the claim. It doesn't forbid

In the context of this case, the jury was merely asked via Special Interrogatory I(a) whether there was room in the constitutional closet to hang my claim; they properly responded in the affirmative without specifying or being required to specify what the label was above the peg upon which they hung my claim. In any case, Justice Ginsburg held that the Fourth Amendment was the proper peg and she wrote that

> [a] person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned **right to travel** outside the jurisdiction. Pending prosecution, his **employment prospects may be diminished severely**, **he may suffer reputational harm**, and he will experience the **financial and emotional strain** of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should

---

hanging the same claim in the constitutional closet on a peg with a different name, i.e. a different constitutional provision such as the Fourth Amendment. In fact, Justices Souter and Ginsburg argue that a Fourth Amendment claim is viable while the plurality of Rehnquist, O'Connor, Scalia, and Ginsburg express no opinion but agree that the Fourth Amendment provides the proper lens with which to view the claim. It's clear to me, however, that I have a good claim under 42 U.S.C. § 1983 based on at least one constitutional provision. It doesn't matter to me what the label is called, Maloney was wrong, and his conduct was unconstitutional.

> not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.[4]

Albright v. Oliver, 510 U.S. 266, 278-279, 114 S.Ct. 807, 815-816 (1994)(Ginsburg, J., concurring).

As Justice Ginsburg so ably points out, I was seized for Fourth Amendment purposes from July 3, 1990 until September 25, 1990, without, as the jury found, any probable cause to believe I had committed the crime of Assault with a Dangerous Weapon much less two counts of it. I was forced to appear, under penalty of arrest, on August 3, 1990, August 30, 1990, and finally on September 25, 1990. This implicated my Fourth Amendment right to be free from unreasonable seizures of my person. The fact that I was unreasonably and therefore unconstitutionally seized to chill my exercise of my right to seek redress in the Courts implicates rights secured on due process and equal protection grounds as well as 1st Amendment grounds. Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987). That Boyle would claim that "there was no Fourth Amendment peg upon which to hang a constitutional malicious prosecution claim" is a futile exercise is labeling which ignores substance in favor of form; in any case, there are no form problems here as every conceivable peg in the constitutional closet was alleged in

---

[4] On the summons-and-complaint alternative to custodial arrest, see 2 W. LaFave, Search and Seizure 432-436 (2d ed. 1987).

the amended complaint: 1st, 4th, 5th, and 14th amendment as well as the Right to Redress in the Courts, the Right to Due Process, and the Right to Equal Protection of the Law. See Count 7 of the Amended Complaint and paragraphs 44, 124, 132, 133, 140, 154, 166, 167, 178, and 192- 204. Paragraph 192 of Count 7 realleges and incorporates by reference all of paragraphs 1 through 189, so all of the constitutional provisions are embodied in Count 7. Boyle's narrow-minded focus on the rifle as the only possible Fourth Amendment claim is one of the many reasons why he lost this case. The Fourth Amendment covers both seizures of persons and things. The Court made this abundantly clear to the jury when the Court instructed the jury on the Fourth Amendment in response to their jury question on February 12, 1997 at Day-page/line 7-29/16 to 7-30/3 by simply reading the Fourth Amendment to the jury, and several hours later, they found in my favor.

THE HARMS VISITED UPON ME ARE ACTIONABLE UNDER 42 U.S.C. § 1983

Boyle's argument in this section depends on the flawed premise that there were no Fourth Amendment claims before the jury. He comes up with a specious argument that the jury had to go through an inconsistent analysis to find Maloney liable. This is not so. If the jury was given the option to find for me based on **either** a bad motive **OR** probable cause, then the Court's instruction would have been flawed. Here, the jury had to find **both** before I could win. Boyle would have me **only** jump through one hoop before I could win; the Court made me jump through both the "probable cause" **AND** the "unconstitutional motive" hoop. Any error in this regard is harmless, and in any event, such an error, if any, accrued in Maloney's favor as he was protected by an extra element that I had to prove.

APPENDIX I – EXCERPTS FROM MALONEY'S OPENING BRIEF DATED JANUARY 11, 1999 SHOWING THAT MALONEY BRIEFED THE FIRST AMENDMENT 42 U.S.C. § 1983 CLAIM

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT PATRICK J. MALONY

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Dated: January 11, 1999

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Appendix I

First Paragraph from Section II.E., Page 26 of Maloney's Opening Brief

E. RELEVANCE OF THE RIGHT NOT TO SUFFER RETALIATION.

While canvassing the different jurisdictions which have recognized an actionable § 1983 claim based on a First Amendment theory of retaliation, the district court noted: "Since I have found that the Fourth Amendment adequately states a claim, I need not address whether this claim could have been cognizable under a First Amendment or Equal Protection theory as well," Britton v. Maloney, 981 F. Supp. 25, 40 n. 29 (1st Cir. 1997). Since the district court's ruling on Maloney's motion for judgment as a matter of law was not decided on a First Amendment basis, this court should refrain from addressing the issue and decide only on the strength of the district court's Fourth Amendment reasoning. See Morales v. Ramirez, 906 F.2d 784, 786 (1st Cir. 1990) ("That intricate legal riddles spark judicial interest is not enough to justify a court in volunteering solutions.").

APPENDIX J – EXCERPTS FROM BRITTON'S OPPOSING BRIEF DATED FEBRUARY 16, 1999 SHOWING THAT THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE BASIS FOR THE 42 U.S.C. § 1983 CLAIM WAS NOT WAIVED

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095, 98-2096

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

Appeal From A Judgment Of The United States District Court For The District Of Massachusetts

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PLAINTIFF-APPELLEE'S OPPOSING BRIEF IN 98-2095 WITH APPENDIX

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Excerpt from Page 7 of My Opposing Brief

> Unconstitutional Motive or Improper Purpose are fair questions in 42 U.S.C. § 1983 claims when the First or the Eight Amendments provides the rule of analytical decision or in the case of the Fourth Amendment, when probable cause is lacking.

Excerpt from Page 22 of My Opposing Brief

IN THE FIRST CIRCUIT, MALICIOUS PROSECUTION REMAINS A VIABLE 42 U.S.C. § 1983 CLAIM TO DETER POLICE MISCONDUCT UNDER EITHER THE FIRST, FOURTH, OR EIGHTH AMENDMENTS

> Maloney claims that the Trial Court erred by submitting a malicious prosecution claim to the Jury under 42 U.S.C. § 1983. Judge Gertner's reasons in support of her decision are both overwhelming and compelling. Britton v. Maloney, 981 F. Supp. 25, 34-40 (D. Mass. 1997). After a detailed analysis of Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807 (1994) which was credited with four stars by Westlaw's Keycite citator service, Judge Gertner concluded that

Page 23 of My Opposing Brief

> Britton's § 1983 claim falls within the territory left open by Albright in three separate ways: (a) Justice Ginsburg's "continuing seizure" theory; (b) Justice

Souter's "exceptional case" theory; and (c) a line of cases--not discussed in Albright--which I will refer to as the "retaliation cases.

Britton v. Maloney, 981 F. Supp. 25, 37 (D. Mass. 1997).

"[A] decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." Wolford v. Lasater, 78 F.3d 484, 488 (10th Cir. 1996).

This may also implicate yet another constitutional command: the Equal Protection Clause. See Gehl Group v. Koby, 63 F.3d 1528, 1538 (10th Cir. 1995) (discussing plaintiffs' claim that they were singled out for prosecution because of their exercise of a fundamental right; "such differential treatment could implicate equal protection concerns, just as it could First Amendment concerns.").

Britton v. Maloney, 981 F. Supp. 25, 40 fn. 29 (D. Mass. 1997).

Agreement with Judge Gertner's opinion has been foreshadowed by this Court in two separate post Albright decisions, both of which were cited by Judge Gertner's well researched opinion: Calero-Colon v. Betancourt-Lebron, etc., et al., 68 F.3d 1, 3 fn. 7 (1st Cir. 1995) and Roche v. John Hancock Mut. Lif. Ins. Co., 81 F. 3d 249, 256 fn. 5 (1st Cir. 1996).

In Roche at 256 this Court wrote

[t]he appellant's allegations of malicious prosecution cannot salvage his § 1983 claim. The law is settled

that a garden-variety claim of malicious prosecution garbed in the regalia of § 1983 must fail.

Excerpt from Page 24 of My Opposing Brief

In Roche, at 256 fn. 5, this Court wrote

> FN5. Although the Supreme Court left open the possibility that a malicious prosecution claim might lie under § 1983 on the basis of the Fourth Amendment, see Albright, 510 U.S. at ---- - ----, 114 S.Ct. at 813-14, we need not explore this virgin territory. Even assuming the vitality of such an approach, the existence of probable cause vitiates any arguable Fourth Amendment claim.

But my 42 U.S.C. § 1983 claim is not a garden-variety malicious prosecution claim. There is more. After proving each and every element of the state law tort for malicious prosecution, I also proved each and every element for a claim under 42 U.S.C. § 1983: (1) that the malicious prosecution was committed by a state actor, and (2) it deprived me of my constitutional rights under the 1st (chill and deter), 4th (seizure of my person), and 8th (retaliation) Amendments. Britton v. Maloney, 981 F. Supp. 25, 41 (D. Mass. 1997)("Britton established all these elements, as well as the violation of his Fourth Amendment rights.").

Under Meehan v. Town of Plymouth, No. 97-2235, 1999 U.S. App. LEXIS 1942, 1999 WL 44756 (1st Cir. February 3, 1999), I have done all that is required.

Appendix J

Excerpt from Page 38-39 of My Opposing Brief

As illustrated above, Maloney filed the false charges against me to retaliate against me and to chill my exercise of my constitutional rights. This is actionable under the First Amendment and under the Equal Protection Clause of the Eighth Amendment. Maloney's actions in seizing my rifle, thereby seizing me, and filing a false Summons and Complaint violates the Fourth Amendment. These claims are all actionable under 42 U.S.C. § 1983.

APPENDIX K – EXCERPTS FROM MALONEY'S REPLY BRIEF DATED FEBRUARY 26, 1999 SHOWING THAT MALONEY KNEW I WAS PURSUING MY 42 U.S.C. § 1983 CLAIM BASED ON MORE THAN JUST THE FOURTH AMENDMENT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No .98-2095

RANDY BRITTON,

Plaintiff-Appellee,

-vs-

PATRICK J. MALONEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER OF THE CITY OF BOSTON,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT PATRICK J. MALONY

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Excerpt from Section II.B.2., Page 9 of Maloney's Reply Brief

2. No Violation of the First Amendment.

The district court's ruling on Maloney's motion for judgment as a matter of law was decided on the basis of the Fourth Amendment only.[1] This court should, therefore, decide the appeal on the strength of the district court's Fourth Amendment reasoning.

---

[1] While canvassing the different jurisdictions which have recognized an actionable § 1983 claim based on a First Amendment theory of retaliation, the district court noted: "Since I have found that the Fourth Amendment adequately states a claim, I need not address whether this claim could have been cognizable under a First Amendment or Equal Protection theory as well." Britton v. Maloney, 981 F. Supp. 25, 40 n. 29 (1st Cir. 1997)

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See Morales v. Ramirez, 906 F.2d 784, 786 (1st Cir. 1990) ("That intricate legal riddles spark judicial interest is not enough to justify a court in volunteering solutions.")

APPENDIX L – JURY INSTRUCTIONS: MALONEY'S APPENDIX PAGES 203-212

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RANDY BRITTON, Plaintiff,	)
v.	) Civil Action
PATRICK J. MALONEY, and Edward Dooley, Defendants.	) No. 93-11430-NG

JURY INSTRUCTIONS

I. THE PARTIES

This case had been brought by Randy Britton. He is suing officers Edward Dooley and Patrick Maloney.

II. THE FEDERAL CIVIL RIGHTS LAW - - SECTION 1983

The law to be applied in this case is the federal civil rights law. The federal civil rights law, Section 1983 of Title 42 of the United States Code, provides that any individual may come to this court seeking damages against any person or persons, who, under color of state law, deprive that individual of any of his constitutional rights.

Before section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the constitution and federal laws.

Appendix L

• ELEMENTS OF A SECTION 1983 CLAIM

To establish a claim under section 1983, plaintiff must establish, by a preponderance of the evidence, each of the following three elements:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. Here, a number of rights are claimed to have been violated 1) the right to be free from being charged with a crime without probable cause to believe a crime was committed and 2) the right to be free from unreasonable seizure of person and property and 3) the ability to enforce that right. I will deal with each of these in turn.

Third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

• ELEMENT ONE - COLOR OF LAW

The first element of the plaintiff's claim is that defendants acted under color of state law. "Acting under color of law" means "under pretense of law," and simply means acting in one's capacity as a police officer. There is really no dispute that at the time of this incident, the defendants were police officers in the city of Boston acting in their official capacity. The plaintiff does not have to prove that defendants were acting within the law, if they were acting as police officers, then they were acting under color of law.

Appendix L

- **ELEMENT TWO - DEPRIVATION OF RIGHTS**

The second element of plaintiff's claim is that he was deprived of a federal right by the defendants. As I have mentioned, there are several federal rights which have been claimed to be violated. I will get to each in turn.

- **ELEMENT THREE - PROXIMATE CAUSE**

The third element which the plaintiff must prove is that the defendants' were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damages sustained by the plaintiff.

An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damages was a reasonably foreseeable consequence of the defendants' acts or omissions. If an injury was a direct result or a reasonably probable consequence of defendants' acts or omissions, it was proximately caused by such acts or omissions.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of the defendants.

Appendix L

- **ELEMENT TWO – THE RIGHT TO BE FREE FROM PROSECUTION THAT IS WITHOUT PROBABLE CAUSE AND UNLAWFULLY MOTIVATED**

The Fourth Amendment to the United States Constitution protects all individuals in this country from unreasonable seizures of him or her and his or her property. A criminal prosecution brought with the intent to chill Fourth Amendment rights is a violation of a person's civil and constitutional rights.

In order to prove this violation, Mr. Britton must prove the following. First, he must prove that the prosecution was initiated without probable cause to believe an offense had occurred. Second, he must prove that the prosecution was unlawfully motivated, that the officer's intent was to retaliate against Mr. Britton for his threats to enforce his Fourth Amendment rights. If you find that there was probable cause to proceed against Mr. Britton you may go no further.

Let me first turn to the question of whether there was probable cause to bring charges against Mr. Britton.

- Probable cause is a legal term which means that the police officer who charged the individual must have sufficient facts which would warrant a reasonable man in believing that a criminal offense had been committed by the individual charged. A police officer is entitled to rely upon his own observations in determining whether or not probable cause for an arrest exists or information which is reasonably reliable which he may receive from other individuals. Probable cause exists for any criminal offense only if there is probable cause to demonstrate that the individual accused has

committed each and every element of the criminal offense.

- Probable cause may not be based upon conjecture, speculation or surmise or other subjective guesses or hunches. It cannot be bases on pretextual, or imagined reasons.

- It must be based upon observable objective events or other objective factors of the individual's actions.

The second issue relates to the motive of the officer.

- If you find that the determining or motivating factor behind the prosecution of Mr. Britton is improper, you may find that the prosecution was a violation of Plaintiff's civil rights. A determining or motivating factor is one which caused the prosecution to occur and without which you find the prosecution would not have occurred. An improper motivation includes, in the context of this case, a motive to chill, prevent or deter one or more of the Plaintiffs' rights, here, the right to enforce the Fourth Amendment. The Plaintiff need not prove that the Defendants' sole motive was to retaliate for the plaintiff's exercise of his constitutional rights. Rather, the Plaintiff need only show that this unlawful motive was a determining or motivating factor in makir .ne prosecution.

There is only one charge which you have to consider in terms of whether there was probable cause—assault with a dangerous weapon.

Appendix L

First, I turn to assault:

- The classic definition of an assault is any action which places someone in reasonable fear of bodily injury, whether or not the defendant actually intended to harm the victim. Conviction of assault does not require that any physical injury be proven. A weapon may put someone in fear within the meaning of this law whether or not it is loaded.

- Thus, in this case, the allegation was that Mr. Britton committed assault with a dangerous weapon on Tyrone Stampley and Tammy Loughlin, a.k.a. Tammy Carpenter, by threatening them with an unloaded gun. You must determine whether the police officers had probable cause to believe Mr. Britton had committed this offense.

III. MALICIOUS PROSECUTION

There are four elements of malicious prosecution:

(1) the defendant must be found to have instituted a criminal action against plaintiff;
(2) the prosecution must have ended in the plaintiff's favor. I instruct the jury that the charges against Mr. Britton were dismissed for want of prosecution, which is a termination in his favor;
(3) there must have been no probable cause to initiate the criminal proceeding; and
(4) that the defendant acted maliciously. Malice is more than mere mistake. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict injury or primarily motivated by hostility and ill will, and without belief by the accuser in the guilt of the accused. When probable cause is deficient, you may

infer the existence of malice, but you are not bound to do so.

IV. STATE CIVIL RIGHTS LAW

Plaintiffs have also made claims under the Massachusetts Civil Rights Act. This Act, like the federal law, protects the same civil rights about which I have instructed you, defined as I have defined them.

There are some differences. To establish a violation of the state civil rights act, Plaintiffs must show you, by a fair preponderance of the evidence, that the violation of civil rights was accomplished by threats, coercion or intimidation. A threat simply means saying or gesturing, in effect, if you don't do this, then something bad will happen to you. Coercion is making someone do something they are unwilling to do. Intimidation is scaring someone into doing something or refraining from doing something that otherwise they would do. If you find an element of threats, coercion or intimidation and a violation of civil rights, then the plaintiffs have proved a violation of the Massachusetts Civil Rights Statute and are entitled to recover damages under that law.

V. ABUSE OF PROCESS

For abuse of process, the plaintiff must prove that (1) process was used; (2) for an ulterior or illegitimate purpose, namely for a purpose other than that for which it was designed or intended; (3) which resulted in damage. An action for abuse of process can lie against police officers who use a lawful criminal process to accomplish an unlawful purpose.

Appendix L

VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To make out a valid claim for intentional infliction of emotional distress, the plaintiff must show that following elements:

(1) the defendant intended to inflict emotional distress or knew or had reason to know that emotional distress would result from the conduct;
(2) the conduct was extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized society;
(3) the defendant's actions caused the plaintiff's distress; and
(4) the plaintiff's distress was severe and of a nature that no reasonable person could be expected to endure it.

VII. DAMAGES

If you decide for the Plaintiff on the issue of liability then you may consider the amount to award in money damages to the plaintiffs. You should award Mr. Britton the amount of money damages which you find will reasonably and fairly compensate him for any harm which the wrongful conduct of one or more of the defendants was a substantial factor in causing. The elements of injury and harm which you should consider and provide a fair and reasonable compensation for include:

1. Any fear, anxiety, emotional or other mental distress or harm which the plaintiff suffered during or after the incident;

2. Any emotional upset, distress, anxiety or other mental harm which the plaintiff suffered as a result of the incident and the events which followed from it including his prosecution; and,

3. Any humiliation, embarrassment, loss of self-respect or esteem or any emotional anxiety, mental harm, fear or mental anguish that the plaintiff has suffered up to the present time and may suffer, with reasonable certainty, in the future as a result of the violation of his civil rights.

There are additional concerns:

You are to award compensatory damages only if you find actual injury caused by constitutional deprivations.

Damages for mental distress should not result in a windfall to the plaintiff. Mr. Britton is only entitled to the damages he can prove. A claim of mental suffering should not result in damages if there is no evidence that such injury actually was caused.

Damages based on the abstract value or importance of constitutional rights are not a permissible basis of compensatory damages. If you find that the plaintiff suffered no injury, no compensatory damages can be awarded.

The Plaintiff is not entitled to a double recovery. Therefore, if you award Mr. Britton damages for the constitutional claims you may not award any more damages under the common law claims.

APPENDIX M – VERDICT SLIP: MALONEY'S APPENDIX PAGES 219-226

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RANDY BRITTON,	)	
Plaintiff,	)	
v.	)	Civil Action
PATRICK J. MALONEY,	)	No. 93-11430-NG
and Edward Dooley,	)	
Defendants.	)	

AMENDED SPECIAL INTERROGATORIES

I. SECTION 1983: BRITTON V. MALONEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick Maloney violated the plaintiff's federal civil rights by prosecuting him without probable cause and with an unconstitutional motive?

YES ✓ NO ____

(b) If your answer to question (a) is Yes, was defendant Maloney's conduct a proximate cause of the plaintiff's damages?

YES ✓ NO ____

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Maloney for this conduct?

$ 200,000

Appendix M

II. SECTION 1983: BRITTON V. DOOLEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Edward Dooley violated the plaintiff's federal civil rights by prosecuting him without probable cause and with an unconstitutional motive?

YES ___ NO ✓

(b) If you answer to question (a) is Yes, was defendant Dooley's conduct a proximate cause of the plaintiff's damages?

YES ___ NO ___

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Dooley for this conduct?

$ _____

III. MALICIOUS PROSECUTION, BRITTON V. MALONEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick Maloney maliciously prosecuted him?

YES ✓ NO ___

(b) If you answer to question (a) is Yes, was defendant Maloney's conduct a proximate cause of the plaintiff's damages?

YES ✓ NO ___

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Maloney for this conduct?

$ 0

IV. MALICIOUS PROSECUTION, BRITTON V. DOOLEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Edward Dooley maliciously prosecuted him?

YES ___ NO ✓

(b) If you answer to question (a) is Yes, was defendant Dooley's conduct a proximate cause of the plaintiff's damages?

YES ___ NO ___

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Dooley for this conduct?

$ _____

V. STATE CIVIL RIGHTS, BRITTON V. MALONEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick Maloney used threats, intimidation or coercion against him in violation of the plaintiff's state civil rights?

YES ✓ NO ___

(b) If you answer to question (a) is Yes, was defendant Maloney's conduct a proximate cause of the plaintiff's damages?

YES ___✓___ NO ____

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Maloney for this conduct?

$ ____0____

VI. STATE CIVIL RIGHTS, BRITTON V. DOOLEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Edward Dooley used threats, intimidation or coercion against him in violation of the plaintiff's state civil rights?

YES ___✓___ NO ____

(b) If you answer to question (a) is Yes, was defendant Dooley's conduct a proximate cause of the plaintiff's damages?

YES ____ NO ___✓___

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Dooley for this conduct?

$ _____

Appendix M

VII. ABUSE OF PROCESS, BRITTON V. MALONEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick Maloney committed an abuse of process against him?

YES ✓ NO ____

(b) If you answer to question (a) is Yes, was defendant Maloney's conduct a proximate cause of the plaintiff's damages?

YES ✓ NO ____

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Maloney for this conduct?

$ 0

VIII. ABUSE OF PROCESS, BRITTON V. DOOLEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Edward Dooley committed an abuse of process against him?

YES ✓ NO ____

(b) If you answer to question (a) is Yes, was defendant Dooley's conduct a proximate cause of the plaintiff's damages?

YES ____ NO ✓

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Dooley for this conduct?

$ _____

IX. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, BRITTON V. MALONEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Patrick Maloney intentionally inflicted emotional distress on him?

YES ___ NO ___✓_

(b) If you answer to question (a) is Yes, was defendant Maloney's conduct a proximate cause of the plaintiff's damages?

YES ___ NO ___

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Maloney for this conduct?

$ _____

X. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, BRITTON V. DOOLEY

(a) Has the plaintiff, Randy Britton, proven by a preponderance of the evidence that defendant Edward Dooley intentionally inflicted emotional distress on him?

YES ___ NO ___✓___

(b) If you answer to question (a) is Yes, was defendant Dooley's conduct a proximate cause of the plaintiff's damages?

YES ___ NO ___

(c) If your answer to question (b) is Yes, what amount of compensatory damages, if any, do you award to the plaintiff against defendant Dooley for this conduct?

$ _____

Date: 2-12-97

s/Vickey E. Hurst
FOREPERSON

APPENDIX N – MALONEY'S JURY REQUEST NO. 52: MALONEY'S APPENDIX PAGE 197

REQUEST NO. 52

DAMAGES

The plaintiffs are not entitled to double recovery. Therefore, if you award the plaintiffs damages for the constitutional claims you may not award them any more damages under common law claims.

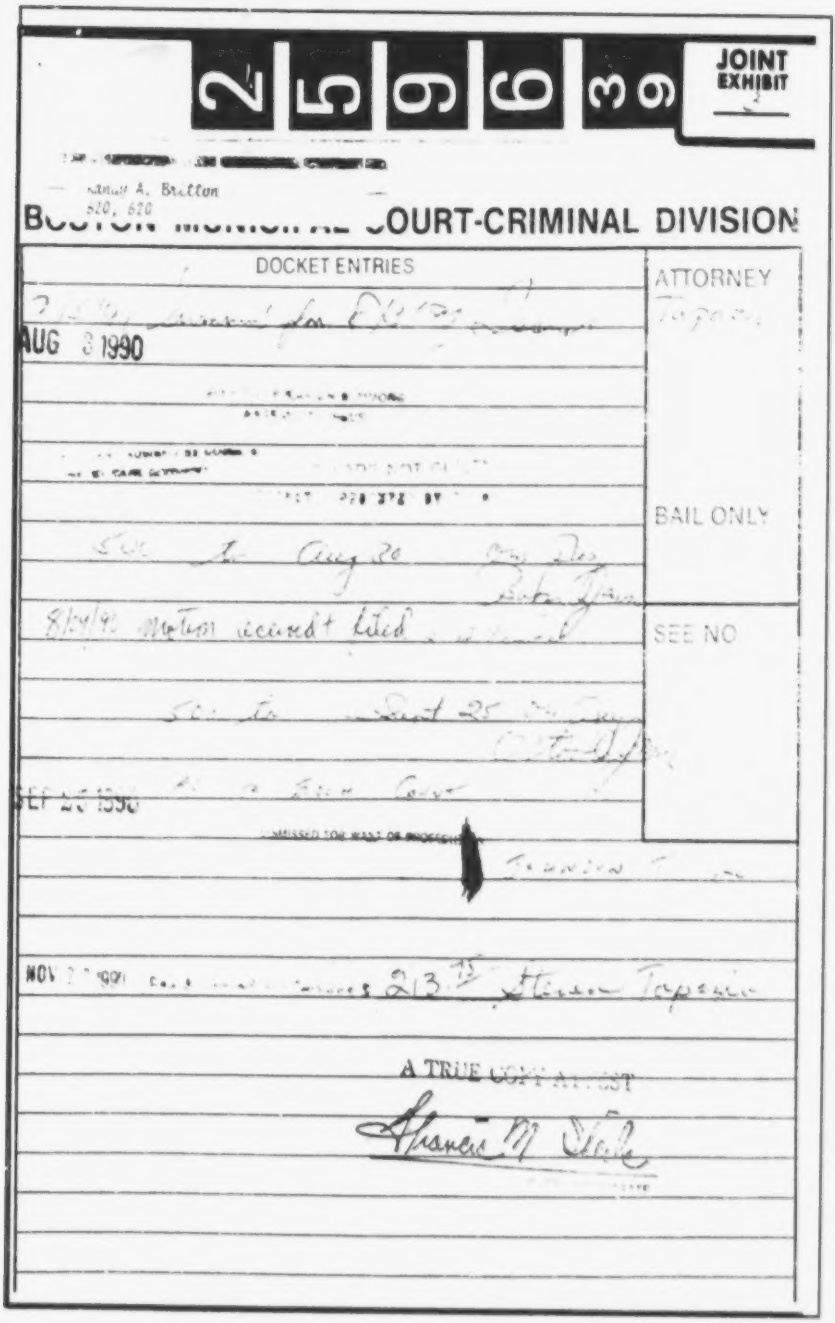
Respectfully Submitted,
THE DEFENDANTS

Merita A. Hopkins
Corporation Counsel

By its attorney:

s/Robert J. Boyle
Robert J. Boyle Jr.
Assistant Corporation Counsel
Tel. 635-403/ BBO#555886
City of Boston Law Department
Room 615, Boston City Hall

APPENDIX O – JOINT TRIAL EXHIBIT 3: BOSTON MUNICIPAL COURT DOCKET SHEET: MALONEY'S APPENDIX PAGE 1003



2 5 6 6 3 9

JOINT EXHIBIT

Samuel A. Britton
620, 620

BOSTON MUNICIPAL COURT-CRIMINAL DIVISION

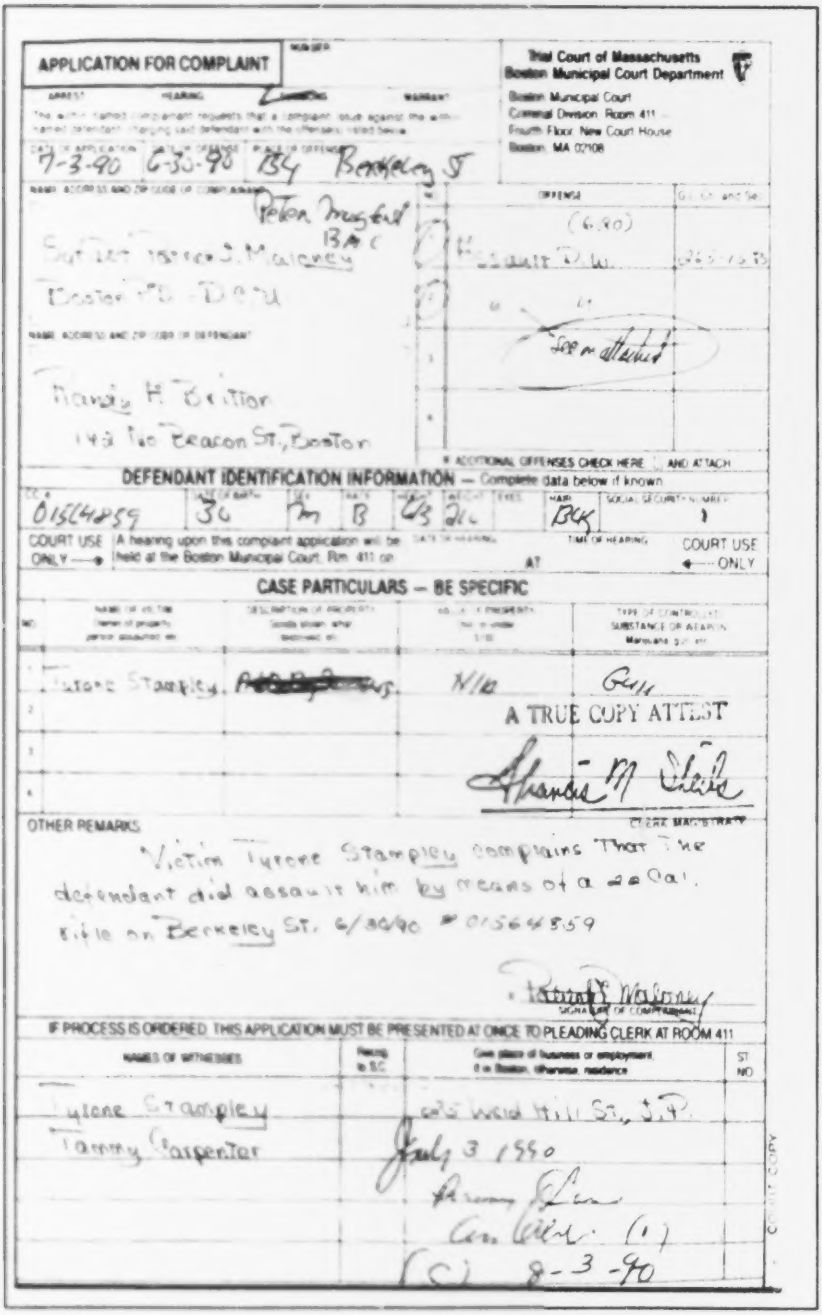
DOCKET ENTRIES	ATTORNEY
AUG 3 1990	BAIL ONLY
8/24/90 Motion to withdraw filed	SEE NO
SEP 27 1990	
NOV 2 1990	

A TRUE COPY ATTEST

Frances M Slade

BEST AVAILABLE COPY

APPENDIX P – PAGE 2, JOINT TRIAL EXHIBIT 4: APPLICATION FOR A CRIMINAL COMPLAINT: MALONEY'S APPENDIX PAGE 1005



APPLICATION FOR COMPLAINT

Trial Court of Massachusetts
Boston Municipal Court Department
Boston Municipal Court
Criminal Division Room 411
Fourth Floor New Court House
Boston, MA 02108

DATE OF APPLICATION 7-3-90 DATE OF OFFENSE 6-30-90 PLACE OF OFFENSE 134 Berkeley St

Peter Mugford
134 Berkeley St
Boston MA

Handy H Britton
143 Tremont Beacon St, Boston

OFFENSE

(6.90)
Assault & Bat.

See attached

ADDITIONAL OFFENSES CHECK HERE AND ATTACH

DEFENDANT IDENTIFICATION INFORMATION — Complete data below if known

ID #	DATE OF BIRTH	AGE	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR	SOCIAL SECURITY NUMBER
01564859	36	M	B	6'3	210			BLK	

COURT USE ONLY — A hearing upon this complaint application will be held at the Boston Municipal Court, Rm. 411 on DATE OF HEARING AT TIME OF HEARING — COURT USE ONLY

CASE PARTICULARS – BE SPECIFIC

NO.	NAME OF VICTIM (Name of property, person assaulted, etc.)	DESCRIPTION OF PROPERTY (Goods stolen, what destroyed, etc.)	VALUE OF PROPERTY (If money state amount)	TYPE OF CONTROLLED SUBSTANCE OR ATTEMPT (Marijuana, Class, etc.)
1	Tyrone Stanley, [redacted]		N/A	Gun
2				
3				
4				

A TRUE COPY ATTEST

Handy H Clerk
CLERK MAGISTRATE

OTHER REMARKS

Victim Tyrone Stanley complains That the defendant did assault him by means of a dangerous rifle on Berkeley St. 6/30/90 # 01564859

Patrick J Maloney
SIGNATURE OF COMPLAINANT

IF PROCESS IS ORDERED THIS APPLICATION MUST BE PRESENTED AT ONCE TO PLEADING CLERK AT ROOM 411

NAMES OF WITNESSES	Person to be Summoned	Give place of business or employment if in Boston, otherwise residence	ST NO
Tyrone Stanley		625 Mass Ave, S.B.	
Tammy Carpenter		July 3 1990	
		Tammy Carpenter	
		Com. Clerk (1)	
		(C) 8-3-90	